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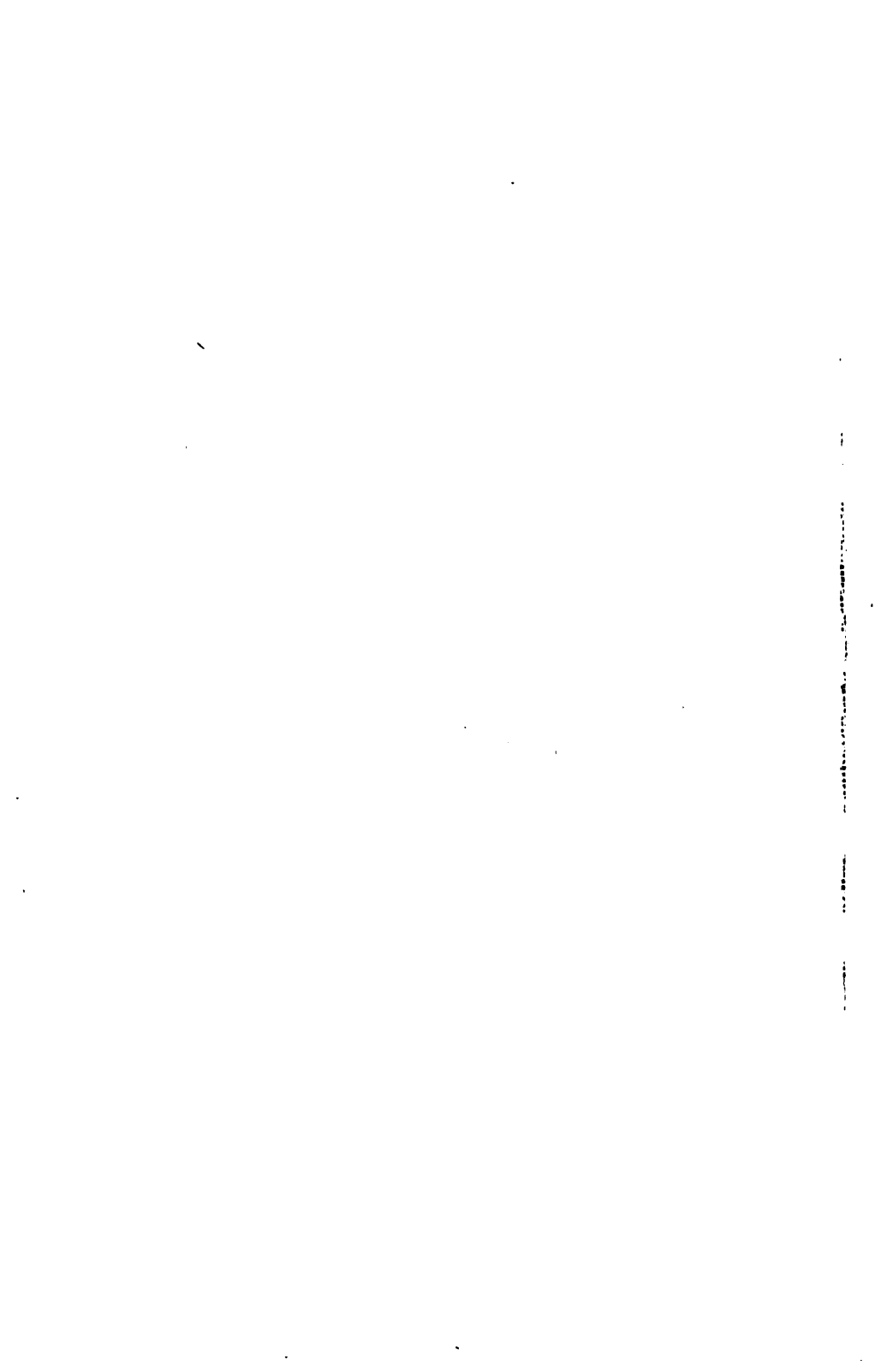
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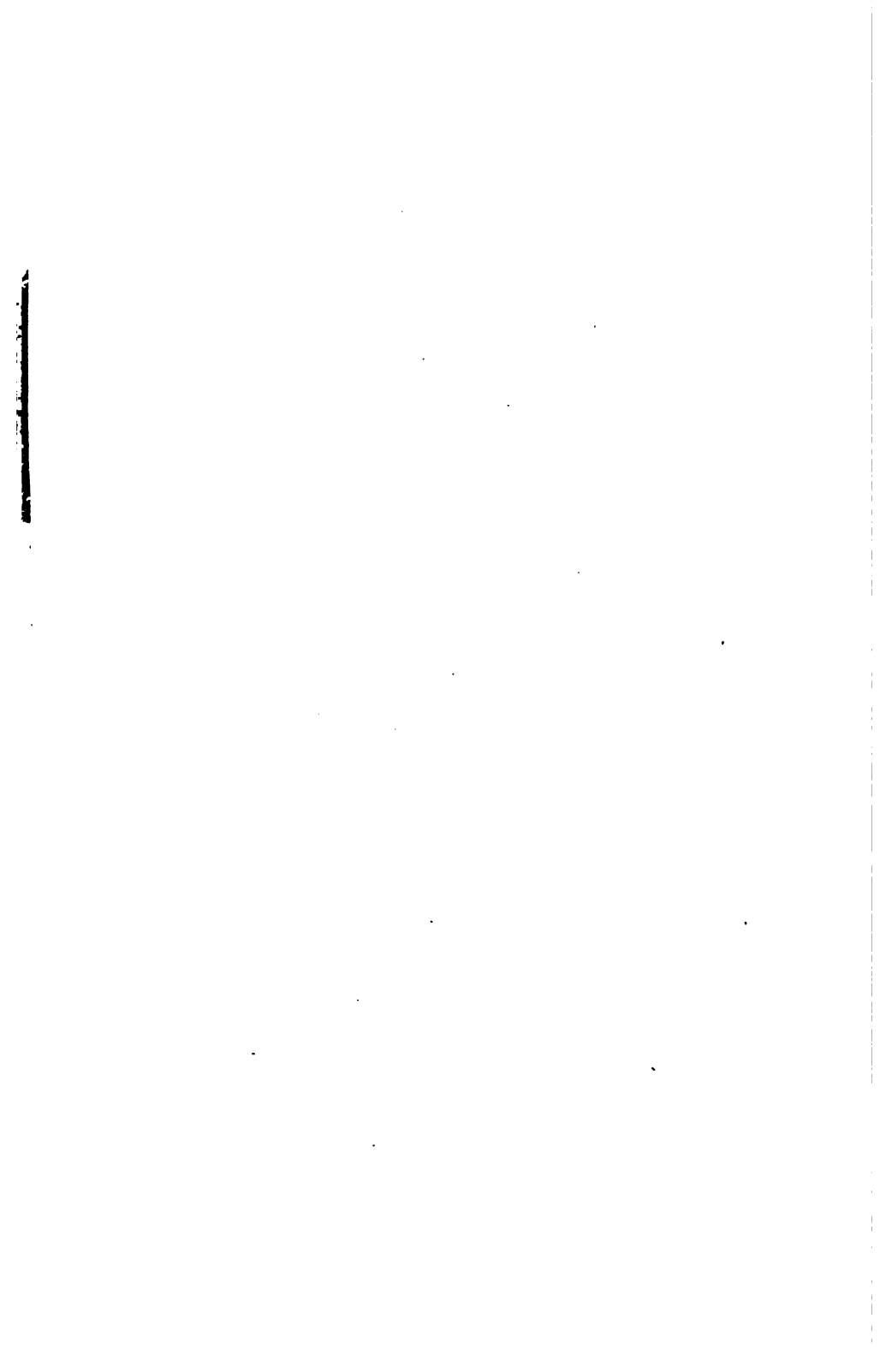
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LECTURES
ON
JURISPRUDENCE

OR
THE PHILOSOPHY OF POSITIVE LAW

BY THE LATE JOHN AUSTIN
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LECTURES ON JURISPRUDENCE.

LAW IN RELATION TO ITS SOURCES

AND THE

MODES IN WHICH IT BEGINS AND ENDS.

LECTURE XXVIII.

ON THE VARIOUS SOURCES OF LAW.

IN the ensuing lectures I shall treat of the following subjects :—

1st, The *sources* of law, and the various modes in which it originates : under which head I shall treat of the distinctions between law written and unwritten ; law positive and natural ; *jus civile* and *jus gentium* ; *law* and *equity* : touching on various other topics which are suggested by them.

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ive view
of the re-
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the course.

2ndly, From the sources of law, and the modes in which it originated, I shall proceed to the distinction between the law of things and the *law of persons* ; and in endeavouring to analyse that distinction, I shall examine the notion of *status* or condition, and the distinction between public and private law : for the term public law, unless it be used in a sense which would include all law, denotes, as it appears to me, a particular department of the law of persons.

3rdly, I shall examine the arrangement of the Roman lawyers in their institutional and elementary writings ; an arrangement which I believe to be just in the main, and which is unquestionably the groundwork of most of the modern attempts to give a systematic shape to the whole body of any system of law.

And this I am afraid will be nearly all which I shall be enabled to accomplish within the present course. I have thought it better to explain fully, and with passable distinctness, a few leading topics, than to touch on a great number lightly and hastily. The gentlemen who have so kindly come forward to support me in my first attempt, will, I am sure, make the due

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allowance for the imperfections unavoidable in a commencement, and for the occasional interruptions which have been caused by inevitable illness. If I am able to get through these topics before the expiration of the session, I will then touch upon some of the details of the science, such as the various species of rights *in rem*; dominium, servitus, and so on: the distinction between contracts and quasi-contracts, and an outline of the various species of contracts. I am extremely sorry to be obliged to leave off in this lame manner, but I hope that I shall meet with the indulgence due to a first attempt.

Meanings
of the
phrase
'Sources
of the law.'
1. The
direct or
immediate
author of
the law.

In many legal treatises, and especially in treatises which profess to expound the Roman law, that department or division which regards the *origin* of laws, is frequently entitled '*De juris fontibus.*' The expression *fontes juris*, or *sources* of law, is ambiguous.

In one of its senses, the source of a law is its direct or immediate author. For either directly or remotely, the sovereign, or supreme legislator, is the author of all law; and all laws are derived from the same source; but immediately and directly laws have different authors. As proceeding from *immediate* authors of different characters or descriptions, laws are talked of (in the language of metaphor) as if they arose and flowed from different fountains or sources: in other words, the *immediate* author of a given Rule (whether that author be the sovereign or any individual or body legislating in subordination to the sovereign), is styled the fountain, or the source, from which the rule in question springs and streams. But this talk is rather fanciful than just; for, applying the metaphor with the consistency which even poetry requires, rules established immediately by the supreme legislature are the only rules springing from a *fons* or *source*. Individuals or bodies legislating in subordination to the sovereign, are more properly *reservoirs* fed from the source of all law, the supreme legislature, and again emitting the borrowed waters which they receive from that Fountain of Law.

Taken in the sense to which I have now adverted, the fountains or sources of laws are their *immediate* authors or makers. Thus the supreme legislature is the author or source of the laws which it publishes directly. A corporate body, or a subordinate legislature (like those of our colonies), is the source of those laws which it makes and publishes with the sovereign's consent. Courts of justice are a source of law, in so far as the law consists of judicial decisions, binding upon subsequent judges. And admitting for the present that customs

constitute a distinct species of law, custom, or the persons with whom the custom originated, are authors or sources of law.

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In another acceptation of the term, the fountains or sources of laws are the original or earliest extant monuments or documents by which the existence and purport of the body of law may be known or conjectured.

2. The earliest documents by which the existence of law is evidenced.

Taken in this acceptation, the fountains or sources of laws are properly sources of the *knowledge* which is conversant about laws: '*fontes e quibus juris notitia hauritur.*'

But the term '*fontes*' (as thus understood) is restricted to the original, or to the earliest extant, documents. Documents which are copies of these, or which give at second-hand the evidence contained in these, are not *fontes* or sources of knowledge, but *rivi* or conduits through which it emanates from the sources. For example: Considered in mass, all the relics of antiquity, which regard the Roman law, are '*fontes juris Romani*;' '*fontes e quibus juris Romani notitia hodie hauritur.*' For (speaking generally) the extracts from the classical jurists contained in Justinian's Digest, the Imperial Constitutions contained in his Code, with such other relics of antiquity as regard the Roman law, are the earliest evidence, or the earliest extant evidence, for the several parts of the system to which they respectively relate. These, therefore, are '*fontes.*'

But the works of the Glossators and Commentators who wrote in the Middle Ages, with the works of Civilians who have written in subsequent periods, are not fountains or sources of that knowledge of the system which may be gotten at the present hour. For the countless authors of those countless volumes derived their own knowledge of the Roman Law from ancient documents or monuments which are still extant and accessible. Accordingly, the works of the Glossators and Commentators who wrote in the Middle Ages, with the works of Civilians who have written in subsequent periods, are by the German writers on jurisprudence distinguished from the documents which constitute the *fontes* or sources by the general and collective name of '*Literatura.*'

The term '*fontes juris*' has, therefore, a double signification. As proceeding from immediate authors, of various characters or descriptions, laws are said to emanate from various *sources* or *springs*: whilst the earliest extant documents which attest their being or purport are also entitled '*sources* or *springs* of law,' or source or springs of the knowledge which is conversant about it.

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And so (in regard to the *English* law), the statutes, the reports of judicial decisions with the old and authoritative treatises which are equivalent to reports, may be deemed sources of English jurisprudence; whilst the treatises on the English law, which merely expound the matter of those statutes and reports, are not sources of English jurisprudence, but are properly a legal literature drawn or derived from the *sources*.

Law written and unwritten. As understood by the modern Civilians, and by Hale and Blackstone.

Law considered with reference to its sources, is usually distinguished into law written and unwritten.

The distinction between written and unwritten law in the modern acceptation of the term, is this: *Written* law is law which the supreme legislature establishes directly. Unwritten law is not made by the supreme legislature, though it owes its validity, or *is law* by the authority, expressly or tacitly given, of the sovereign or state. Accordingly the modern Civilians, with whom the distinction as thus understood originated, commonly ranked under *jus scriptum*, laws made by the *populus* or *plebs*, *senatus-consulta* and the constitutions of the emperors. Laws enacted by the people assembled in centuries, were made by the supreme legislature, and were therefore *jus scriptum* in the sense above explained; and the same may be said of the constitutions or orders of the emperors after they openly assumed the style of sovereignty. How the plebs or the senate came to be held equivalent to the *populus* assembled in centuries will be considered in a subsequent part of this lecture.

According to the same division, the edicts of the Prætors and other judicial functionaries, the rules introduced by the practice of the tribunals, the writings and opinions of juriconsults, and laws established by custom, were unwritten law, or *jus non scriptum*. For although law originating in any of these sources, owed its validity to the assent of the supreme legislature, it was not made by the supreme legislature, directly and immediately.

The distinction between written and unwritten law, as drawn by the modern Civilians, was adopted by Hale, and imported by Blackstone into his Commentaries. Both Hale and Blackstone restrict *leges scriptæ*, or written laws of this kingdom, to statute acts or edicts made by the king, by and with the consent of the lords spiritual and temporal and commons in Parliament assembled. General and partial customs, and laws established by the practice and usage of the Courts, they rank under *leges non scriptæ*, or unwritten laws.²⁵

²⁵ The foregoing part of this lecture is not contained in the former edition, the

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Written
and un-
written
law *sensu*
Roman
Lawyers²⁶

By the Roman Lawyers themselves, little importance was attached to the distinction between written and unwritten law. And, in every instance in which they take the distinction, they understand it in its literal sense. When they talk of *written* law, they do not mean law proceeding directly from the supreme Legislature, but law which was committed to writing at its origin: *quod ab initio literis mandatum est*. And accordingly they include in written law, not only the laws of the *Populus* and *Plebs*, with the *Senatus-consulta* and Constitutions of the Emperors, but also the Edicts of the *Prætors* and other *Magistrates*, and the Responses of the *Jurisconsults*.

Law originating in custom, or *ex disputatione fori*, they style *jus non scriptum*. For law originating in custom, or floating traditionally amongst lawyers (as in England it is well known that there is much law constantly manufacturing at the bar, which in time is adopted by the judges, and by them again emitted to the bar), is not committed to writing *ab initio*, although it may afterwards be recorded in legal treatises, or may be adopted by the supreme legislature and promulgated in a written form. Justinian, in the second title of the first book of his *Institutes*, mentions the distinction in the sense last adverted to. Gaius, in his enumeration of the sources of Law, passes over the distinction in silence. The latter says, 'Constant autem jura ex legibus, plebiscitis, senatus-consultis, constitutionibus Principum, edictis eorum qui jus edicendi habent, responsis prudentium.'²⁷ He afterwards speaks of Customary Law, or of the '*jus quod consensu receptum est*;' and also of *Mos* as a source of law. But he nowhere adverts to writing, or to the absence of writing, as forming a ground of distinction between the species of laws.

The distinction (if such it can be termed) which was taken by the Roman Lawyers, is altogether insignificant: Insignificant, inasmuch as commission to writing, *by, or by authority of immediate author*, is an accident; though no considerable body of law can be preserved and known, unless written, with or without authority.

That which has been taken by the moderns is important. But nothing can be less significant or more misleading than the language in which it is conveyed. For, first, law, though it originate with the supreme legislature, is not necessarily written.

Written
and un-
written
law, ac-
cording
to the im-

corresponding part of the MS. having (as it appears) been missing. It is here supplied from J. S. M.'s notes.—R. C.

²⁶ Dig. I. 1, 6.

²⁷ Gaii Comm. I. 2.

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proper and juridical meaning of the terms, is an important distinction.

The distinction stated in appropriate terms.

Examples of laws made directly by the sovereign.

1. Acts of the British Parliament.
2. Ordinances made by the États Généraux in old France, while they subsisted, and by the King afterwards.
3. The *leges plebiscita*, and *senatus-consulta* of the Romans.

It may be, and in many nations has been, established and promulged without writing. And, on the other hand, law flowing from another source, though obtaining as law with the consent of the supreme legislature, may be committed to writing at its origin. Such, for instance, are the laws of Provincial and Colonial Legislatures. And such especially (as I shall shew hereafter) were the edicts of the prætors.

Laws, then, are distinguished in respect of their sources, or of their direct or immediate authors, into laws which are made directly and immediately by the supreme legislature, and laws which are not made directly and immediately by the supreme legislature, although they derive their validity from its express or tacit authority. I shall now proceed to give examples of these two kinds of laws.

An example of laws made by the sovereign body directly and immediately, is that of our own Acts of Parliament, which are made directly by the supreme legislature in its three branches, the King, the House of Lords, and the House of Commons.

Another example is that of the enactments passed by the États-Généraux in France, while that body continued to exist and to be recognised as the supreme legislature. When the Kings of France became constitutionally the sovereigns, or when the French Government became a monarchy, the royal ordinances were laws of the same kind.

In Rome under the Commonwealth, or *in liberâ republicâ*, laws established by the supreme legislature were of three kinds: there were three distinct bodies whose decrees were considered as made by the sovereign or supreme legislature. These were 1st—the *populus*, assembled in *curiæ*, according to the most ancient form, or, according to the manner subsequently introduced, in *centuries*; 2ndly, the *plebs*, assembled in tribes; and 3rdly, the *senate*.

Strictly speaking, the sovereignty resided in the *populus*; which included every Roman invested with political powers, and therefore included members of the *senate*, as well as citizens who were not senators. To laws made by the *populus* (whether assembled in *curiæ*, according to the more ancient manner; or in *centuries*, according to the more recent fashion), the term '*leges*' or '*statutes*' (when used with technical exactness) was exclusively applied. But as the term '*leges*' or '*statutes*' was afterwards extended improperly to laws made by the *plebs*, '*leges*' strictly so called, or laws made by the *populus*, were

commonly styled, for the sake of distinction, '*Leges curiatae*' or '*Leges centuriatae*.'

The *plebs* (as distinguished from the *senate*) included all citizens of plebeian birth who were not senators.

The *senate* (as distinguished from the *plebs*) included all citizens of patrician birth, and also all citizens of plebeian birth who filled (or had filled) certain of the higher offices. For example: Consuls, prætors, and tribunes of the *plebs*, together with *ex-consuls* and *ex-prætors*, were members of the assembly styled the *senate*, whether they were patricians or plebeians.

The distinction between *patrician* and *plebeian*, and the distinction between *senate* and *plebs*, were therefore disparate. For, although every patrician seems to have been a senator, many of plebeian birth sat and voted in the senate.

A law passed by the *plebs* was styled, in accurate language, a *plebiscitum*. But as every *plebiscitum* was equivalent to a *lex*, the term '*leges*' was extended *improperly* from laws made by the *populus* to laws made by the *plebs*.

How *plebiscita* acquired the form of *leges*, or came to be considered as laws made by the supreme legislature, it is not very easy to determine. For the *plebs* was only a portion of the whole Roman People, and therefore was not the body wherein the sovereignty resided. It seems not unlikely, that the *plebs* (instigated by their Tribunes) assumed the power of legislating for the whole community: and that the senate (too feeble to resist) yielded, after a struggle, to the unconstitutional pretension. Gaius tells us expressly, that the senate at first refused to recognize *plebiscita* as *leges* generally binding; but that the force of *leges* was at length imparted to *plebiscita* through a law passed by the *populus*.²⁸

It also seems probable (as is suggested by Hugo, an eminent German writer on the Roman Law), that a compromise took place, and the *plebiscita* were prepared first by the senate and then adopted by the *plebs*. And, if that supposition be just, every law of the kind was made with the concurrence of *both*, and was nearly equivalent to a *Lex*, or statute made by the entire people. The power of supreme legislation, instead of being exercised by the *populus* assembled in a single body, was exercised by two bodies into which the *populus* was divided. One of these bodies (namely the *senate*) possessed the *initiative*, or the power of *proposing* laws. The other of these bodies

²⁸ Gaii Comm. I. 3.

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(namely the *plebs*) possessed the power of passing or rejecting laws concocted and proposed by the senate.

Laws passed by the senate (which were styled *senatus-consulta*) were also equivalent to *leges* made by the assembled *populus*.

It has often been inferred from a passage in Tacitus, that consults or acts of the senate first acquired this virtue under the reign of Tiberius. But they are distinctly placed by Cicero (writing *liberâ republicâ*) on a level with *leges* and *plebiscita*. Nor is there here the slightest difficulty. For, since the tribunes of the *plebs* sat in the senate, and by simply uttering their *veto* might have arrested its proceedings, it follows that a consult of the senate was passed with the concurrence of the *plebs*, assenting to the act by its representatives. *Senatus-consulta* therefore were not acts of the senate alone, but acts of the senate in which the *plebs* by their representatives concurred.

The result then seems to be this :

Libera republicâ, or, during the Commonwealth, the supreme legislative power resided in the Roman *People* (including the *senate* and *plebs*).

This legislative power was sometimes exercised by the people, as collected in a single assembly. At other times, it was exercised by the same people as divided into two bodies : —namely, *by the plebs*, with the concurrence of the senate ; or *by the senate*, with the concurrence of the *plebs*. And, in either of these last-mentioned cases, the joint act of the parts into which the whole was divided, was equivalent to an act of that sovereign whole as united in one assembly. If our House of Lords and House of Commons sometimes sat and voted in one assembly, and sometimes separately as at present, they would afford an exact parallel to the manner in which the sovereignty was divided in the Roman Republic. Acts passed by the two bodies assembled in one house, would correspond to *leges curiatae* and *centuriatae* ; acts originating in the one House and adopted by the other, would be *plebiscita* or *senatus-consulta*. The only difficulty in this explanation is, that the equestrian order, although of course members of the *populus*, were not members either of the *senate* or *plebs*. Enactments passed by one of those bodies with the concurrence of the other were therefore not, strictly speaking, acts of the entire *populus* ; though acts of the *populus*, united in *curiæ* or *centuriæ*, were so.

The Constitution of the Roman Republic is not very accurately known ; nor, with a view to the study of the Roman

law, is any very accurate knowledge of it necessary; since the whole of the body of Roman law which existed in the time of Justinian was of a date posterior to the termination of the republican government. But a knowledge of the general outline of the Roman constitution is necessary for understanding the law terms.

While, then, the Roman Commonwealth virtually existed, law created immediately by the supreme legislature was established in three modes:—by *leges*, or *statutes*, strictly so called; by *plebiscita*, also styled *leges*; and by *senatus-consulta*.

While I am on the subject of *leges*, I will just observe, that *lex* in the Roman writers is always equivalent to the word statute. It invariably signifies some particular law, made in a manner which would induce us to call it a statute; and is never used (like our word law) as a collective name to signify all law, whatever its form or origin. The word which the Roman writers employ for this purpose is *jus*; which denotes all laws and all rules of law, let their origin be what it may. It is a sure sign of utter unacquaintance with the Roman writers, to use the word *lex* in that enlarged sense; thus Chief Baron Gilbert, by speaking of *lex prætoria*, betrays his ignorance of the Roman Law.

After the destruction of the Commonwealth and the establishment of the Empire, the supreme legislative power, though it virtually resided in a monarch, was long exercised to appearance in the ancient and constitutional modes. Laws were still made by the *populus*, *plebs*, or *senate*, although those bodies were obedient instruments of the Emperor, and legislated at his suggestion, or at the suggestion of his creatures. As assemblies of the *populus* or *plebs* were the less commodious tools, the work of supreme legislation was commonly done to appearance by the smaller and more manageable body. The laws which really emanated from the military chief of the Empire, were usually voted by the senate at the instance of the prince ('ad orationem principis'), and were promulged or published as *senatus-consulta*.

4. The constitutions of the Roman Emperors.

And here it may be observed that the only constitutional title of the chief of the state was Princeps: which corresponds not exactly to the term *president* of the senate, but rather to our phrase *father* of the senate; the oldest and most authoritative member who had no particular rights in consequence of his rank, except that of preaudience, and some honorary

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observances. The head of the state, though really despotic, was by fiction nothing more than *princeps senatus*; he was never called emperor (*imperator*), which was a mere military title and denoted *general*; except when he was considered as chief of the army. *Princeps* is the title invariably given by Tacitus.

From the accession of Hadrian, and perhaps from an earlier period, the Emperors openly assumed the supreme legislative power which they had before exercised covertly. Instead of emitting their laws through the *populus*, *plebs*, or *senate*, they began to legislate avowedly as monarchs and autocrats, and to notify their commands to their subjects in *Imperial Constitutions*.

These imperial constitutions (which are not unfrequently styled *principum placita*) were general or special.

General
Constitu-
tions.

By a *General Constitution* (*edictum*, *lex edictalis*, *epistola generalis*) the emperor or prince, acting in his legislative capacity, established a law or rule of a universal or general character, and not regarding specifically a single person or case.

Special
Constitu-
tions.
(a) Extra-
ordinary
mandate.

Special constitutions were of various kinds, but agreed in this: that they regarded specifically single persons or cases. One kind of special constitution was called an extraordinary mandate; and was an order addressed to a civil or military officer, for the regulation of his general conduct in the execution of his office, or even for the regulation of his conduct on a particular occasion. But the most important and remarkable of all these special constitutions, were those *decretes* and *rescripts* which were made by the Emperors, not in their quality of sovereign legislators, but in their quality of sovereign judges: a *decree* being an order made on a regular appeal from the judgment of a lower tribunal; and a *rescript* being an order preceding the judgment of the lower tribunal, and instructing that lower tribunal how to decide the cause.

(b) Privi-
legia.

By a *Special Constitution* of another class, the Emperor conferred on some single person some anomalous or irregular right, or imposed upon some single person some anomalous or irregular obligation, or inflicted on some single person some anomalous or irregular punishment. Such constitutions were styled *privilegia*. Or, speaking more accurately, such constitutions were *privilegia* issued by the Emperors. For a *Lex* or *Senatus-Consultum* of the same purport or effect, would also have been a *privilegium*. When such *privilegia* conferred anomalous rights, they were styled *favourable*. When they

imposed anomalous obligations, or inflicted anomalous punishments, they were styled *odious*. An act of the British Parliament giving to the inventor of a machine an exclusive right of selling it, would be styled in the language of the Roman Law 'a favourable privilege.' An Act of Attainder would be styled in the same language 'an odious privilege.'

A privilege, in short, is a special act affecting special persons with an anomalous advantage, or with an anomalous burthen. It is derived from *privatum*, which, as opposed to *publicum*, signified anything which regards persons considered individually; *publicum* being anything which regards persons considered collectively, and as forming a society. *Privilege* in English denotes rather the anomalous right than the law giving the anomalous right, or impressing an anomalous obligation. Thus it would be said that an inventor had obtained the privilege of being the only seller of his invention; not that the legislature had enacted a *privilege* conferring on him that right. In common and loose talk, our word privilege seems to be merely synonymous with right. It may here be observed that although a *privilegium*, considered from one aspect, regards a single or determinate person; considered from another aspect, it regards persons generally. Although by a patent, an exclusive right of selling a given article be conferred solely on me, the same law is evidently general so far as respects the corresponding obligation on other persons to abstain from violating my right. And the same may be said of a *privilegium* imposing an obligation upon an individual; it supposes obligations on other persons generally to forbear from all acts which would hinder the performance of the obligation. It is for this reason that it is necessary to define a *General Constitution* negatively, as I have done in the definition above given: namely, a law or rule of a universal or general character, and not regarding specifically a single person or case.

A third class of these Special Constitutions, and the most important and remarkable, consisted of those decretes and rescripts which were made by the Emperors, not in their quality of sovereign legislators, but in their quality of sovereign judges; a *decrete* being an order made on a regular appeal from the judgment of a lower tribunal; and a *rescript* being an order preceding the judgment of the lower tribunal, and instructing that lower tribunal how to decide the cause.²⁹ For,

(c) Decreta
and re-
scripts.

²⁹ Like the rescripts of the Roman epistles of the Popes are all rescripts in Emperors the canon laws or decretal the strictest sense.

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Judicial
powers are
implied in
sovereignty,
but
commonly
delegated.

although in modern Europe the judicial power residing in the sovereign is commonly delegated by him to individuals called judges, the Roman emperors were themselves judges in the last resort.

I find this a convenient opportunity to observe that sovereignty, being unlimited and incapable of any legal limitation, includes the judicial as well as the legislative power. The judicial powers implied in sovereignty are in our own times commonly delegated wholly or in part; but in the nations of antiquity and in the Middle Ages the person or body of persons composing the supreme legislature was also the judge in the last resort, or even in the first instance. The *populus* of Rome, which was the supreme legislative body, was also the judge in capital cases. The *Mickle-mote* or *Wittenage-mote* of the Anglo-Saxons was both the legislature and a Court of Justice. Even after the Norman Conquest, the *Aula Regis* or Great Court Baron of the kingdom, was a Court of Justice as well as the sovereign or supreme legislature; and it is from the *Aula Regis* that our House of Lords, although no longer the same assembly, and not now the sovereign, but a branch of the supreme legislature, derives the judicial power which it still exercises. I cannot remember that Parliament in its collective capacity ever exercised judicial power, although there is one case (by the statute of Treasons, 25 Edward II. c. 2) wherein our present Parliament (meaning the King, Lords, and Commons) appears to have been invested by statute with the powers of a Court of Justice. Indeed, the judicial power seems to have been more completely detached from the legislative in our own country than in any other.

The proper purpose of a decree was the decision of some question touching the existing law which had arisen in a particular cause between particular parties. But the law was often made by imperial decrees, as it is by the decision of our Courts. Where the existing law afforded no principle applicable to the case, or where the supreme judge was ignorant of the existing law, or disliked it and was desirous of setting it aside, he decided the case on some new ground, which usually became law as completely as if it had been solemnly enacted by an edict. To use our own expression, it served as a precedent. The principle on which it was founded was considered as law, and applied as such to the decision of subsequent cases.

Nature of
oblique
legisla-

This mode of establishing laws I shall analyse hereafter; in the meantime I will mention that the manner of legislating by

judicial decision is the same, whether the judge be sovereign or subordinate; though the law in the two cases is derived from different *sources*. As a subordinate body clothed by the sovereign with legislative power may make laws by direct enactment, so the sovereign, acting in the capacity of a judge, may make them in the indirect mode of judicial decision. This distinction between direct and oblique legislation, or legislation in the legislative and in the judicial mode, is far more important than the distinction between written and unwritten law, or law made directly by the sovereign, and law made immediately by a subordinate authority.

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tion, or
judiciary
law intro-
duced.

Having now given examples of law made directly and immediately by the sovereign, I proceed to examples of law *not* made directly and immediately by the sovereign, although it exists or obtains *as law* by the express or tacit authority of the supreme legislature.

Examples
of law *not*
made di-
rectly by
the sove-
reign or
supreme
legisla-
ture.

And, first, laws made by subordinate legislatures, in the direct or legislative manner, are not established *immediately* by the *supreme* legislature, although they derive their force from the *authority* of the sovereign.

Such were the laws made by the Irish Parliament before that Act of the British Parliament which acknowledged the independence of Ireland. In fact and practice, the Irish Legislature (consisting of the King and the Irish Houses of Parliament) was in a state of subjection to the supreme legislature of Britain: that is to say, to the same King and the British Houses of Parliament. An Act of the British Legislature bound the inhabitants of Ireland, if the Act contained a provision extending it to that country. And acts of the Irish Legislature might have been abrogated or modified by acts of the British.

(1) Laws
made by
the Irish
Parlia-
ment
1719-1782.
Colonial
Assem-
blies.

Laws made by *Collegia*, or by Corporate bodies, belong to the same class. They are made immediately by the Corporate bodies themselves, but owe their legal validity to the authority of the sovereign.

(2) Bye-
laws made
by *collegia*
or cor-
porate
bodies.

The power of subordinate legislation granted to a subordinate legislature, is conferred by the sovereign legislature expressly or tacitly.

If it be granted or admitted by written or oral declaration, it is conferred by the sovereign *expressly*.

The sovereign confers it *tacitly*, by any conduct (not consisting in such declaration) which necessarily supposes that he acknowledges or admits it. For example, if he enforce a law

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made by a subordinate legislature, or permits his Courts of Justice to enforce that law, his positive or negative conduct necessarily supposes that he acknowledges a power of legislation in the immediate author of the law.

(8) Laws made in the way of direct legislation by Courts of Justice.

Of laws made by subordinate legislatures in the direct or legislative mode, the most remarkable are those which are made by Courts of Justice, not in their judicial capacity, and in the way of decisions on special cases, but by a power of proper legislation conferred upon them expressly or tacitly by the supreme legislature.

(a) *Regule praxis* of our own Courts.

Such are the *regule praxis* published by our own Courts of Justice, which are distinguished broadly from the laws established by the same Courts in the indirect mode of judicial decision.

(b) The *arrêts réglementaires* of the French Parlements.

Such also were the *arrêts réglementaires* of the French *parlements*; which were not judicial decisions on specific or particular cases, but general laws or statutes, promulged by the *parlements* acting as subordinate legislatures. Their decisions on special cases were not only different in their character, but bore a different name: *arrêts judiciaires*, which is equivalent to judgments or decisions.

(c) The edicts of the Roman Prætors.

Such above all were the edicts of the Roman Prætors forming the body of law called *Jus Prætorium*. The manner in which this portion of the Roman Law was made, and the causes of its being made, are among the most interesting phenomena in the history of jurisprudence. It was not made in the way of decisions in particular cases, but consisted of general laws, made and promulged in the way of direct legislation; by virtue of a power assumed at first by the Prætors, with the acquiescence of the supreme legislature, and subsequently confirmed to them by its express recognition and authority. Agreeably to their application of the terms written and unwritten law, corresponding to the distinction which I am now illustrating, *Jus Prætorium* is invariably classed by the modern Civilians under the head of unwritten law. For though such rules were *written* (in the *grammatical* sense of the expression), and moreover were *promulged* or *published*, they yet proceeded immediately from *subordinate* authors, and are therefore rightly classed under *unwritten* law, according to the improper sense of the opposed epithets *written* and *unwritten* as applied to law, which I call their *juridical* sense.

(4) Laws made in the way of

Another species of laws emanating immediately from a subordinate authority, consists of laws established obliquely, or by

judicial decisions: namely, by the decisions of subordinate tribunals: for laws, as has already been observed, are occasionally made in this oblique manner by the sovereign himself. And agreeably to their application of the terms written and unwritten law in the *juridical* sense, the term *unwritten* law is applied by the same modern Civilians to the rules of *judiciary* law which were engendered by the *usus fori*: that is to say, which were immediately created by the Prætors, and other subordinate judges, as directly and properly exercising their judicial functions.

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judicial
decisions.

The term unwritten law in the same meaning is applied by the same Civilians to *jus moribus constitutum*, and *jus prudentibus compositum*, that is to say, law emanating (or supposed to emanate) from opinions emitted by respected, but merely private, jurisconsults in responses, in commentaries, or in systematic treatises. But neither laws originating in customs, nor laws originating in the private opinions of jurisconsults or institutional writers, are (properly speaking) distinct species of law in respect of their sources.

Laws originating in customs, and in the opinions of the jurists, not distinguishable from other laws in respect of their source.

A custom, as such, independently of legislative sanction, is not a law, but a moral rule. When it has been embodied or promulgated in a statute, or made the ground of a judicial decision, it has the force of law; but then it is statute law built on an anterior custom, or law established by a judicial decision of which anterior custom was the basis or principle.

The same reasoning applies to law originating in the opinions of private jurisconsults. The writings and opinions of jurisconsults are often causes of law by determining acts of legislation, and oftener by determining decisions of Courts of Justice. But the source or immediate author of the law is the legislator, sovereign, or subordinate who legislates in pursuance of their opinions, or the judge, sovereign, or subordinate whose decisions their opinions determine.

There are certain opinions of Roman jurisconsults to which this observation does not apply, if we give credence to certain statements in the Digest as to the authority conceded to these jurisconsults.³⁰ For, assuming that these jurisconsults had the authority there alleged to have been conceded to them, they were in effect, though not in name, judges of the law; and their opinion was therefore tantamount to a judicial decision. But it is more likely that the responses of private jurisconsults were never sources of law, though they exerted upon the decisions of

³⁰ Dig. I. 2, § 47. Inst. I. 2, § 8. And *vide post*, p. 545.

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judges that influence which is naturally exercised by known and expert persons over persons comparatively ignorant and unskilful.

The great influence which the *responsa prudentium*, or opinions of private juriconsults, naturally exercised in the making of the law, is manifest from this, that the Pandects are wholly composed of excerpts from their writings. These writings and the Imperial Constitutions had, in the time of Justinian, entirely superseded all the other sources of law, and his compilations, the Pandects and Code, wholly consist of them. Some of our own writers have exercised the same kind of influence: Lord Coke, for example, whose opinion, though not in itself a source of law, would be considered as conclusive evidence of the law as it existed in his time.³¹

(5) Auto-
nomic
laws.

Another species of laws not made by the supreme legislature, are laws (if such they can be called) which are established by private persons, and to which the supreme legislature lends its sanction. These (in truth) are nothing but obligations imposed by virtue of rights which the legislator has conferred. For example, By my will I may impose certain conditions upon devisees or legatees. By virtue of a contract, the contracting parties impose upon one another certain obligations. As a father or guardian, I may prescribe to my child or ward certain conduct, which the Courts of Justice will compel him to follow.

I mention this because such commands are styled by some modern writers *autonomice-gesetze*, which is equivalent to laws made autonomically, or by private authority. This, however, is incorrect, because a private person cannot be the author of law; though he may be a party to a transaction, by which transaction, in virtue of a general law made by the legislator, he gives certain rights and creates certain obligations.³²

Having stated and exemplified the distinction between laws made directly by the sovereign and laws not made by him directly, although existing as laws by his express or tacit consent, I shall next re-state the distinction, or rather the two disparate distinctions, between written and unwritten law, and then proceed to state various distinctions between laws, partly

³¹ There is perhaps no modern body of law which directly owes less to the cause last mentioned (namely the opinions and writings of private lawyers) than the English law. The reason of this is partly its extreme wealth in the memory (assisted by reports) of judicial precedent, and partly its extreme poverty in systematic treatises. But indirectly it owes much to this cause, as will be found insisted on by the author in Lecture XXX. *post*, pp. 546, 547.—R. C.

³² For the more complete analysis of the compound nature of an autonomic law, refer to vol. i. p. 180, and note there.

founded on the difference between their sources, and partly on the difference between the modes in which they originate or arise.

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LECTURE XXIX.

LAW: WRITTEN AND UNWRITTEN—STATUTE AND JUDICIARY.

LAWS are distinguishable not only by the difference of their sources, or immediate authors: They also originate in different ways, or wear different forms at their origin. Laws emanating from a common source, may originate in different modes; and laws which originate in the same mode, may emanate immediately from different authors or sources. For example, a law, whether established immediately by a monarch or sovereign number, or immediately by a subject individual or body, may either be established directly, that is, in the way of proper legislation, or else obliquely, that is, in the judicial mode, by a particular decision on a special point or case. And if established in the way of proper legislation, it may be promulged either in writing or orally; whether its immediate author be sovereign or subordinate.

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Having premised these remarks, I shall now re-state the distinction, or rather the disparate distinctions, between written and unwritten law. In one of these distinctions the terms are taken in the meaning which I have styled their juridical sense; in the other, they are taken in the meaning which may be styled their grammatical or literal sense. The two distinctions, being founded on different properties of the subject to be distinguished, cross at innumerable points.

Re-statement of the distinction between written and unwritten law.

The distinction between written and unwritten law (*sensu juridico*) arose with the modern Civilians, by reasons which it would be too long to state, from a gross misconstruction of the meaning of certain passages in the Digest. In this sense, law established immediately by the sovereign is *jus scriptum* or written law; and law not so established is *jus non scriptum* or unwritten law; whether established directly, that is in the legislative mode; or established obliquely, that is in the judicial mode; whether promulged by writing or published orally. Whatever be its origin, it is written law if it emanate from the sovereign immediately, and if it do not, it is unwritten.

This distinction, therefore, is founded exclusively on difference of source. In spite of the terms *written* and *unwritten*, the

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The same distinction sometimes improperly expressed by the terms promulged and unpromulged.

writing or not writing is accidental or immaterial, as will abundantly appear on consideration of the examples already given in the foregoing Lecture.

The distinction between written and unwritten law, in the juridical meaning of the terms, is also denoted in the writings of the same Civilians, by the opposed epithets *promulged* and *unpromulged*. Law made by the supreme legislature is called *promulged* law, and law emanating immediately from a subordinate source is called *unpromulged* law.

But the terms *promulged* and *unpromulged*, as thus applied, are not less misexpressive than *written* and *unwritten* (*sensu juridico*).

For, *first*, laws established immediately by sovereign authors are not necessarily *promulged*: that is, published, or made known, orally or in writing, for the information and guidance of those who are bound to obey them.

In this country, a Bill, which has passed the two Houses, is a statute, or becomes *obligatory*, from the moment at which it receives the Royal Assent. The concurrence of the various members which compose the supreme legislature (as that concurrence is completed by the royal assent) is the only sign given to the subject community. No promulgation is requisite. 'Because' (as Blackstone remarks) '*every man in England is, in judgment of Law, party to the making of an Act of Parliament, being present thereat by his representatives.*'

It is true, that Acts of Parliament are printed, and may be had by those who choose to buy them; but this is not promulgation; for, before an Act is printed, and whether it is printed or not, it is a statute, and is legally binding. If the printing were a promulgation, in the proper sense of the term, it would be a necessary consideration precedent to the existence of the law as binding on those whom it concerns. The printing is, in this case, merely intended to refresh the memory of the parties whom it concerns; who, being all of them present at the enactment of the law, were then and there sufficiently informed of its existence and purport. Presence by ourselves and presence by our representatives are manifestly the same thing; and the knowledge so obtained is the more satisfactory because five-sixths or nine-tenths of us have no representatives whatever.⁸⁸

⁸⁸ The above paragraph is here restored from J.S.M.'s Notes. The reference to Blackstone's *reason* which, as the passage stood in the last edition, seemed to be treated with an unusual respect, is thus shown to be ironical. —R. C.

was partially directed against the *system* which existed in lieu of representation (*before* the Reform Act of 1832), I think it is rather directed against the *reasoning* of Blackstone in defence of a legal fiction.

According to the practice which obtained under the Roman Emperors, their *general* or *edictal* Constitutions were not binding until they were published. And, hence, it probably has happened, that modern Civilians have applied the term '*promulged*' to Laws proceeding immediately from sovereign authors. But the rescripts of the Emperors, with others of their *special* constitutions, were exclusively addressed (for the most part) to the particular or determinate persons whom they specifically regarded. And yet, through these special constitutions, Law was established, *immediately* by those sovereign princes, in their judicial (or legislative) capacity.

And (*secondly*), as Law made immediately by a sovereign author is not necessarily promulged, so Law may be promulged though it emanates from a subordinate source. Such, for example, was the case with the Law or Equity of the Prætors; whose Edicts were published carefully and conspicuously, in order that all, whose interests they might touch, might know their provisions and regulate their conduct accordingly.

And here I may remark that the expression *promulgare legem* had not originally its present import.

According to the meaning *now* annexed to the expression, 'to *promulge* a law,' is to publish a law already made, in order that those whom it binds may know its existence and purport. According to the meaning *originally* annexed to the expression, 'to *promulge* a law,' was to submit a *proposed* law to the members of the Legislature, in order that they might know its contents and consider the expediency of passing it.

Such was the meaning of the expression, in the language of Roman Jurisprudence, during the Commonwealth. Under the Emperors, the expression acquired the sense which is now universally attached to it.

The distinction between written and unwritten law, in the improper or juridical sense, or between promulged and unpromulged law in the same improper sense, is founded on difference of source. For written or promulged law in this sense is law emanating directly from the supreme legislator: unwritten or unpromulged law in the same sense is law made immediately by a subordinate authority. But the distinction between written and unwritten law, taking the terms in their grammatical meaning, is built exclusively upon a difference in the mode in which they originate. Written law is law which exists in writing at or before its origin; unwritten law is law which neither exists in a written state previously, nor is committed to writing at its

Written
and un-
written
law *sensu*
gram-
matico,
disparate
from the
distinction
sensu
juridico.

origin. The distinction between *written* and *unwritten* law (in the juridical sense of the terms), and the distinction between *written* and *unwritten* law (in the *grammatical* sense of the terms), are therefore disparate and cross distinctions.

According to the distinction in the *grammatical* sense of the terms, *any* law (whether it be statute or judiciary, or whether it emanate from a sovereign or a subordinate source) is *written* law, or (*jus quod scripto venit*) if it be written, at the time of its origin, by the authority of its immediate maker. If it be not so written, it is *unwritten* law, or *jus quod sine scripto venit*.

Such, at least, is the *only* distinction between *written* and *unwritten* law, that appears to be known to the Roman lawyers. Lex, Plebiscita, Senatus-consulta, Principum Placita, are ranked by Justinian with *jus scriptum*, not because they emanated directly from the sovereign authority, but because they existed in a written form at their origin. That this was the ground manifestly appears, because the Prætorian edicts and the *responsa prudentium* are entitled by Justinian, *jus scriptum*. But the Prætorian edicts are clearly *unwritten* law in the juridical sense of the term; and the *responsa prudentium*, assuming that those private jurisconsults were properly authors of law, are necessarily *unwritten* law, in the juridical meaning of the expression.

Customary Law is, according to Justinian, *jus non scriptum*. And so it is in the *grammatical* sense; for, assuming that customary law obtains as *positive law* by virtue of the *consensus utentium*, it naturally originates *sine scripto*.

Law originating in the *usus fori*, or made by subordinate tribunals through judicial decisions, is not referred by Justinian to either class.

But I would remark, that it may belong to *either* class (taking the opposed terms in their *grammatical* sense). If the decisions of the tribunals were committed to writing by *authority* (in the manner proposed by Lord Bacon),³⁴ law established by such decisions would be written law. If they are *not* committed to writing (or are committed to writing by private and unauthorised reporters) the law established by them is unwritten.

Our old Year-books, if they had been regularly kept and preserved, would belong to the class of unwritten law, since

³⁴ Or as now practised by the Judicial Committee of the Privy Council; where the judgment, in cases of importance, is jointly considered and committed to writing *before* being delivered; an admirable method, considering the *quasi-legislative* character attaching to judgments by an appellate tribunal of the last resort.—R. C.

they would be received as evidence of previously existing law.

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In modern Europe, or in some countries of modern Europe, the so-called *jus receptum*³⁵ is deemed *written* Law, if it existed in writing before and at its adoption. It is called *written law*, though not written *as received*, if written *when adopted*.

An example is afforded by those phrases in the old French law: *Pays de droit écrit* and *Pays de coutumes*. *Pays de droit écrit* meant those parts of France where the Roman law prevailed. It was written law in the literal or grammatical sense, but not in the other sense. It was not law made and published by the supreme legislator: for it obtained not by his direct enactment, but by his tacit consent, having been established in those countries before they were conquered by the Franks. But it was written law in the sense which I have called the grammatical sense, for it already existed in writing when it was adopted by the French Courts.

The distinction between written and unwritten Law (as drawn by modern Civilians) has been adopted by Sir Matthew Hale in his history of the Common Law, and imported by Sir William Blackstone into his Commentaries. By these writers on English Law, the terms '*written law*' and '*unwritten law*' are apparently taken in their *juridical* meanings. They both of them restrict the expression *leges scriptæ*, or the written laws of this kingdom, to 'statutes, acts, or edicts, made by the King's majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in parliament assembled.' General and particular customs, together with laws established by the practice or usage of Courts, they refer to the *leges non scriptæ*, or unwritten law.

Written and unwritten law *sensu* Hale and Blackstone.

It must, however, be remarked that they seem to confound the distinction *sensu juridico* and the distinction *sensu grammatico*; and, by consequence, to arrive at a division of law which is incomplete and perplexed.

Their confusion of the two senses.

Speaking of the unwritten Law, Blackstone says, 'I style these parts of our Law *leges non scriptæ*, because their original institution and authority are *not set down in writing*, as Acts of Parliament are, but they receive their binding power, and the

³⁵ *Jus receptum*: With respect to this, Law has sometimes been supposed to obtain independently of sovereign authority.

It may be { Foreign positive Law,
or
International Morality.
The term '*jus receptum*' has even been extended to customary law

force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.'

Now (according to this) the division of Blackstone and Hale stands thus.

Acts of the supreme Legislature are *leges scriptæ*: (Whether as made immediately by the supreme Legislature, or as set down in writing by the authority of the makers, does not distinctly appear).

But any law (*not* created immediately by the supreme Legislature) is *non scriptum*: Provided, that is, that its original institution be *not* set down in writing.

Now (according to this division in which the two distinctions are manifestly confounded) what becomes of laws made immediately by subordinate Legislatures? as, for instance, by the Irish or Colonial Legislatures, or by Courts of Justice (making rules of practice)? These *are* set down in writing by their immediate authors, and are *not* created immediately by the supreme Legislature. Consequently, they cannot be brought under either member of the division as it has been conceived by Blackstone and Hale.

And what would be the class of the judiciary law recorded in the Year-books? Or what would be the class of the law recorded in any of the reports, in case Lord Bacon's suggestion had met with the attention due to it; and the decisions of every tribunal had been recorded by authorised reporters?

It may be here observed that the terms themselves, written and unwritten law, are foreign to the language of English law, though found in Bracton (who evidently borrowed them from the Roman lawyers), and in Hale and Blackstone subsequently. The terms proper to the English law are not *written* and *unwritten* law, but statute law and common law; a classification which also seems to exclude the laws made in the direct or legislative mode by subordinate legislation.³⁶

³⁶ The following passage in Glanville's Preface is worth citing here, both for his use of the term *scriptum* as applied to law, and also for the light which it throws upon the early growth of the common law of England. He says: 'Leges namque Anglicanas, licet non scriptas, leges appellari non videtur absurdum (cum hoc ipsum lex sit, quod principi placet, et legis habet vigorem), eas scilicet, quas super dubiis in consilio definiendis, procerum quidem consilio, et principis accedente auctoritate constat promulgatis. Si enim ob scripture

serentur, majoris (procul dubio) auctoritatis robur ipsis legibus videretur accommodare scriptura, quam vel decernentis equitas, vel ratio statuentis. Leges autem et jura regni scripto universaliter concludi nostris temporibus omnino quidem impossibile est: cum propter scribentium ignorantiam, tum propter earum multitudinem confusam: verum sunt quedam in Curia generalia, et frequentius usitata, que scripto commendare non mihi videtur presumptuosum, sed et plerisque perutile, et ad adjuvandum memoriam admodum necessarium. Harum itaque particulam quandam in

Distinction between law established in the direct or legislative mode and law obtaining obliquely.

The distinction between law established directly and law obtaining obliquely, depends not on a difference in the sources from whence the law emanates, but on a difference in the modes in which it originates. When the law or rule is established directly, the proper purpose of its immediate author or authors is the establishment of a law or rule. When the law or rule is introduced obliquely, the proper purpose of its immediate author or authors is the decision of a specific case or of a specific point or question. Although this specific case is decided by a new rule, the proper purpose of the judge is not the introduction of that rule, but the decision of the specific case to which the rule is applied, and so, speaking generally, the show of legislation is avoided. Generally the new rule is not introduced professedly, but the existing law is professedly ascertained by interpretation or construction, or by a process which I shall hereafter describe analogous to interpretation or construction; and is then professedly applied to the case or question which awaits decision. If the new rule obtains as law thereafter, it does not obtain directly, but because the decision passes into a precedent: that is to say, is considered as evidence of the previous state of the law; and the new rule, thus disguised under the garb of an old one, is applied as law to new cases.

Now, whether established directly or obliquely, a law or rule may emanate either from the sovereign or from an inferior or subordinate source. The judicial power, like all other power, resides in the sovereign, although in most of the governments of modern Europe it is committed by the sovereign to subject or subordinate tribunals. In the Roman Empire, where judicial powers were occasionally exercised by the sovereign in person, the sovereign might legislate either directly or obliquely. According to the expression of Thibaut, in his

scripta redigere decrevi, stilo vulgari et verbis curialibus utens ex industria ad notitiam comparandam eis qui hujusmodi vulgaritate minus sunt exercitati.

Bracton borrows part of this passage, but, missing the fine irony of the reference to the doctrine of the Roman lawyers and the elegance of the argument *à fortiori*, has reduced it to what our author might well call 'jargon.' Bracton says: 'Sed absurdum non erit leges Anglicanas (licet non scriptas) leges appellare, cum legis vigorem habeat, quicquid de consilio et de consensu magistratum, et reipublice communi sponcione, auctoritate regis aive principis precedente, justè fuerit definitum et approbatum.'

By Glanville following the Roman lawyers, *scriptum* as applied to *jus* is understood in its literal sense. His argument is, 'If under the Roman system the pleasure of the Princeps was law, much more rationally may we call that law which though unwritten is known to have been the sentence of the Great Council, with the authority of the King to boot, given after solemn deliberation upon doubtful questions referred to their determination.' To reduce into writing the laws thus floating in the cognisance and memory of those conversant with the practice of the *Curia* is the task humbly undertaken by that great lawyer.—R. C.

admirable work on interpretation, he either legislated *gesetzgebend*; that is, professedly legislating; or *richtend*, professedly judging. The same observation applies to the subordinate judge. When he is expressly or tacitly entrusted with powers of direct legislation, his laws are established in the legislative manner: otherwise they are established in the way of judicial decisions on specific questions or cases. This distinction therefore is founded on a difference in the mode in which laws originate, not in the source from which they flow.

As no short names are afforded by established language, I shall indicate the distinction in question by periphrasis or circumlocution.

For example: Law belonging to *one* of the kinds in question, I shall style, 'Law established *directly*;' 'Law established in the *legislative* manner;' or, 'Law established in the way of *proper* legislation:' That is to say, established immediately by the sovereign, or by any subordinate author, as properly exercising *legislative*, and not *judicial* functions (As *gesetzgebend*, and not as *richtend*).

Laws belonging to the *opposite* kind, I shall style, 'Law introduced and obtaining *obliquely*;' 'Law established or introduced in the *judicial* mode;' or 'Law established or introduced in the way of *judicial* legislation:' That is to say, introduced immediately by the sovereign, or by any subordinate author, as properly exercising *judicial*, and not *legislative* functions (As *richtend*, and not as *gesetzgebend*).

Law of this latter kind (or rather, perhaps, a certain sort of it) has been styled by Mr. Bentham '*Judge-made law*:'—a term pithy and homely, and which I therefore love, but which nevertheless I am constrained to reject.

For, first, it does, in some sort, smack or savour of disrespect. And, as I cannot concur with Mr. Bentham, in his sweeping dislike of law made by judges, I cannot consent to mark or brand it with a name importing irreverence.

Secondly, it tends to confound the *sources*, from which law immediately proceeds, with the *modes* in which it originates. The term '*Judge-made law*' would seem to denote law *made by subject judges*, as opposed to law made by the sovereign Legislature. At least, it would seem to denote law made by subject judges *as exercising their judicial functions*: which (I believe) is the sense annexed to the expression by Mr. Bentham.

Now (as I shall endeavour to shew in a future Lecture) the *important* difference is the difference of *modes*, and not the

difference of *sources*. Provided it be made in the *direct* or in the *legislative* manner, law, established immediately by subject judges, is just as good as law emanating immediately from the sovereign.

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Nay, judges legislating avowedly in the manner of the Roman Prætors, might do the business *better* than any of the sovereign Legislatures which have yet existed in the world.

I would briefly remark, in conclusion, that every possible law, or rule of law, is, on the one hand, *statute* or *judiciary* law, and, on the other hand, *written* or *unwritten* law (in the *juridical* meanings of the terms): Or, in other words, that it emanates, in the way of *direct*, or of *judicial* legislation, from a *sovereign* or *subordinate* source.

LECTURE XXX.

CERTAIN SUPPOSED SOURCES OF LAW EXAMINED.—JUS MORIBUS CONSTITUTUM, JUS PRUDENTIBUS COMPOSITUM, JUS NATURALE.

IN my last two Lectures I endeavoured to explain or indicate the respective natures and the mutual relations, of the three disparate distinctions which I will now enumerate:

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Recapitulation.

1st. The distinction between written or promulged law and unwritten or unpromulged law, in those improper senses, annexed to the opposed epithets, which are styled their *juridical* senses: or, between law proceeding immediately from a sovereign or supreme maker, and law proceeding immediately from a subject or subordinate maker (with the authority of a sovereign or supreme).

2ndly. The distinction between written law and unwritten law, in those more proper senses, annexed to the opposed epithets, which are styled their *grammatical* or literal senses.

3rdly. The more important distinction, between law established directly, and law established obliquely; or between law established in the legislative manner, or in the way of proper legislation, and law established or introduced in the judicial mode, or by way of judicial legislation: or between law established by its immediate author, as directly and properly exercising legislative functions, and law established or introduced by its immediate author, as properly exercising judicial functions.

I also stated and examined the distinction between written and unwritten law, which is made by Sir Matthew Hale and Sir William Blackstone; who apparently intend the distinction between written and unwritten law, in the *juridical* meanings of the terms; but who seem to blend and confound this last-mentioned distinction with the utterly disparate distinction between written and unwritten law, in the *grammatical* senses of the expressions.

Having briefly recalled to your recollection these distinctions, I will now suggest the subjects of the present lecture.

Supposed
kinds of
positive
law.

Every Positive Law, obtaining in any community, is a creature of the Sovereign or State: having been established *immediately* by the *monarch* or *supreme body*, as exercising legislative or judicial functions: or having been established *immediately* by a *subject* individual or body, as exercising rights or powers of direct or judicial legislation, which the monarch or supreme body had expressly or tacitly conferred.

But though every positive law exists *as positive law* through the position or institution given to it by a sovereign government, it is supposed by a multitude of writers on general and particular jurisprudence, that there are positive laws which exist *as positive laws*, independently of a sovereign authority.

The kinds of positive law to which this independent existence is the most frequently attributed, are the following:

1° Customary law: or, the positive law which is made by its immediate authors on customs or *mores*:—

2° The positive law which is made by its immediate authors on opinions and practices of private lawyers:—

3° The law, which, as forming a part (or as deemed to form a part) of every system or body of positive law, is styled natural or universal.

To show the falsity of the supposition in question, through a brief examination of the natures of these three kinds of law, is the main object of the present lecture. The nature of *customary* law, of law formed *on opinions of private lawyers*, and of *natural* law (as a kind of positive law), are therefore its principal *subjects*: And to these subjects I will now address myself in the order in which I have announced them.

Customary
laws; no-
torious,
and need-
ing proof.

The laws or rules styled *customary* may be divided into two classes:—Those which are enforced by the tribunals, without proof of their existence; and those which must be proved, before the tribunals will enforce them.

Laws or rules of the former class, are styled *notorious*. Or

it is said that the tribunals take *judicial* notice of them ; or that the tribunals are conscious *judicially* of their existence.

The division which I have now stated, must not be confounded with the division of laws into general and particular. *General* Laws or Rules (or as they are sometimes styled *Common* Laws or Rules) obtain throughout the territory of the given independent society. *Particular* Laws or Rules obtain in districts or places, which are portions of that territory.

This division and the former division, are disparate or cross divisions.

For, first ; Many *particular* laws (or many of the laws which are restricted to districts or places) are not customary, but statute laws. And (secondly) many laws which are at once particular and customary, are noticed judicially by the tribunals. Such, for instance, are the particular laws, styled the custom of gavelkind, which are restricted to a certain region of our own country.

It is remarkable that the Civil and Canon Laws (as obtaining in England) are ranked by Blackstone and Hale with *particular* customary laws. Inasmuch as they are not restricted to districts or places, but obtain as Law throughout the kingdom, it is clear that they are general, and not particular (taking the terms in the meaning which I have just stated). If they are particular, because they are only applicable to particular matters or subjects (as marriage, testaments, and so on), it follows that every law is a particular law. For no one law regards *all* the subjects about which the aggregate of Laws is conversant. If they are particular, because they are enforced by particular or peculiar Courts, so is Equity particular, and so are certain of the Rules enforced by the General Courts of Common Law. Each of these Courts has rules peculiar to itself: the practice of the Exchequer, and of the Common Pleas, varying from one another, and from the practice of the King's Bench.

Civil and Canon Laws, as *recepta*, ranked by Blackstone with *particular* customs.

The truth is, that the Canon and Civil Laws (as obtaining in England) are what would be styled by the Roman Jurists '*singular*:' that is to say, not singular, as applying exclusively to peculiar subjects, or as obtaining in districts or places, but as not harmonising or being homogeneous with the great bulk of the system.

This want of harmony or consistency with the great bulk of the system, the Roman Lawyers denote by a very odd expression : '*inelegantia juris*.'⁸⁷ Now the Canon and Civil Laws (as

⁸⁷ 'Sed postea divus Hadrianus iniquitate rei et inelegantia juris motus, juris gentium regulam,' etc. — *Gaii Comm.* I. 84, 85.

'Sed et in hac specie divus Vespasi-

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they obtain in England) may be *singular* or *inelegant*, but they are not less portions of the general law of the land than Common Law or Equity.

The division of laws into general and particular, I shall consider in a future Lecture. With reference to my present purpose, a *particular* customary law is not distinguishable from a *general*, provided it belong to that class of customary laws of which the tribunals are judicially conscious or informed, and which they will enforce without proof of their existence.

I shall now advert to general customary laws, and to those particular customary laws which tribunals will enforce without proof of their existence. Those *particular* customary laws of which the tribunals are not judicially informed, I shall consider afterwards. For to them, many of the remarks immediately following will not apply.

A custom is only a moral rule until enforced by the tribunals.

Independently of the position or establishment which it may receive from the sovereign, the rule which a Custom implies (or in the observance of which a custom consists) derives the whole of its obligatory force from those concurring sentiments which are styled public opinion. Independently of the position or establishment which it may receive from the sovereign, it is merely a rule morally sanctioned, or a rule of positive (or actual) morality. It is, properly, *jus moribus constitutum*. It properly obtains as a rule through the *consensus utentium*; its only source or its only authors, are those who observe it spontaneously, or without compulsion by the state.

When turned into a law, it is law emanating from the sovereign, or from a subordinate legislator or judge.

Now a merely *moral*, or merely customary rule, may take the quality of a *legal* rule in two ways:—it may be adopted by a sovereign or subordinate legislature, and turned into a law in the direct mode; or it may be taken as the ground of a judicial decision, which afterwards obtains as a precedent; and in this case it is converted into a law after the judicial fashion. In whichever of these ways it becomes a legal rule, the law into which it is turned emanates from the sovereign or subordinate legislature or judge, who transmutes the moral or imperfect rule into a legal or perfect one.

On the first of these suppositions, the legal rule which is derived from the customary, is Statute Law: and it is styled statute, and not customary law, although it is made, by its immediate author, on a pre-existing custom. For since he utters it, openly and professedly, as and for a positive law, no one confounds the source of the *positive law* itself with the source of the *customary rule* on which it is shaped by the legislator.

On the second of these suppositions, the legal rule which is derived from the customary, is a rule of *judiciary* law. But though, as a rule of judiciary law, it is not less positive law than it would be if it were a statute, it often is deemed law emanating from custom, or *jus moribus constitutum*. For since the judicial legislator is properly acting judicially, and therefore abstains naturally from the shew of legislation, he apparently *applies a pre-existing rule*, instead of making and applying a new rule. And as the pre-existing rule which he appears to apply is apparently the *customary* rule on which he shapes the *positive*, the source of that customary rule, and the source of the positive law which he virtually establishes, are not unfrequently confounded.

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Whether the moral rule be converted into judiciary or into statute law, it emanates as law from the legislator, who grounds a statute upon it, or from the judge, who assumes it as the basis of a judicial decision. The source or *fons* of the legal rule, is not *consensus utentium*, although it retains the name of customary law, when clothed with the legal sanction in the judicial mode.

Those who maintain that it existed as law before it was enforced by the legal sanction, or that it was established as law *consensu utentium*, confound law with positive morality, and run into numberless inconsistencies which they cannot possibly avoid. They are obliged to admit that its *continuance* as law depends on the sovereign pleasure; although if it existed as law independently of the will of the sovereign, no one could abrogate it, except its authors.

Taking the term 'source' in a loose signification, Customs may be styled *sources* of laws. For the existence of a custom, with the general opinion in favour of it, is the cause or occasion, or is one of the causes or occasions, of that legal rule which is moulded or fashioned upon it. But taking the term 'source' in the same loose signification, the causes of the custom from which the law emerges are also a source or fountain of the law itself: And, generally, any cause of any law must be ranked with its sources or fountains.

Extension
of 'source'
to every
'remote
cause' of
Law.

Accordingly, certain writers (as I shall shew hereafter, when I come to Natural Law) have ranked experience and reason, together with the external circumstances wherein mankind are placed, amongst the sources of the laws whereby mankind are governed.

A happier *reductio ad absurdum* of the position maintained by those writers could hardly be devised.

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Auctoritas Prudentium, Authority of Conveyancers, etc., are in the same predicament as Customary Law. So of *Practices of Lawyers*, etc. But if by 'source' be meant the legislative authority from which law proceeds, they are not *sources* although they are *causes*. If you like, you may indeed extend the word 'sources' to these, but then you ought also to extend it to any cause whatever which leads to the establishment of Law: *e.g.*: Reasons assigned in debate; the particular incidents which have occasioned certain laws, etc.; any circumstance, in short, which determined the Legislator or Judge to create the rule. As I have already endeavoured to shew, there can be no law without a legislative act; and for the sake of distinctness I should wish to limit the word 'sources' to the legislative power by which Law is established; and to designate the causes which lead to its establishment by the word 'causes,' or by some equivalent expression.

Generation
of Custom-
ary Law,
per Cicero.

That a custom becomes law, only when enforced by the political sanction, was clearly perceived by Cicero, and stated by him with more of precision than is commonly met with in his writings. If we reject the talk about *nature*, and allow for his habit or trick of sacrificing precision to euphony, we shall find, in the following passage, a correct statement of the origin of customary law. '*Justitiæ initium est a naturâ profectum. Deinde quædam in consuetudinem ex utilitatis ratione venerunt. Postea res, et a naturâ profectas, et a consuetudine probatas, legum metus et religio sanxit.*'

Law styled customary, then, is not to be considered a distinct kind of law. It is nothing but judiciary law founded on an anterior custom. As *merely* customary law (in the loose and improper sense of the term law), or rather as *merely* positive morality, it comes immediately from the subject members of the community by whom it was observed spontaneously or without compulsion by the State; but as *positive law*, it comes immediately from the sovereign or subordinate judges who transmute the moral and imperfect into legal and perfect rules.

Hypo-
thesis of
Black-
stone, etc.
about Cus-
tomary
Law.

But though this account of the matter is palpably true, it is commonly supposed by writers on jurisprudence (Roman, English, German, and others) that law shaped upon customs obtains as positive law, independently of the sanction adjoined to the customs by the State. It is supposed for example by Hale and Blackstone (and by other writers on English jurisprudence) that all the judiciary law administered by the Common Law Courts (excepting the judiciary law which they have

made upon statutes) is *customary* law: and that since this customary law exists as positive law by force of immemorial usage, the decisions of those Courts have not created, but have merely expounded or declared it.

The following are a few specimens of the numerous absurdities and inconsistencies with which this hypothesis is pregnant.

All the customs immemorially current in the nation are not legally binding. But *all* these customs *would be* legally binding, *if* the positive laws, which have been made upon some of them, obtained as positive laws by force of immemorial usage.

Positive law made upon custom is often abolished by Parliament or by judicial decisions. But supposing it existed as positive law by virtue of the *consensus utentium*, it could not be abolished, conformably to that supposition, without the consent and authority of these its imaginary founders.

According to the hypothesis in question, customary laws are not positive laws until their existence *as such* is *declared* to the people by decisions of the Common Law Courts. But if they existed as positive laws, *because* the people had observed them as merely customary rules, such decisions would not be necessary preliminaries to their existence in the former character; since the people would know their existence as positive laws, without the testimony of the judges.

If all our customary laws have obtained from time immemorial, all of them may have obtained from the very beginning of the community. But many of the subjects about which these laws are conversant (as, for example, bills of exchange), had no existence till times comparatively recent. The imaginary authors, therefore, of these immemorial laws, legislated with a spirit of prophecy, and on matters which could not have concerned them.

There is much of the judiciary law, administered by the Common Law Courts, which has not been formed upon immemorial custom, or upon any custom: much of it having been made in recent times, on customs of recent origin; and much of it having been derived by its authors, the Judges, from their own conceptions of public policy or expediency.

Finally the hypothesis seems to be restricted to the rules of judiciary law which are administered by the Common Law Courts; though if all the judiciary law administered by *them* must, as judiciary law, be deemed customary law, the hypo-

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thesis ought to be extended to all the judiciary law administered by the other tribunals.

The prevalent notion about nature of Customary Law suggested to moderns by passage in Pandects.

The conceit that customary law obtains as positive law by virtue of the *consensus utentium*, was suggested to its numerous modern partisans by certain passages in Justinian's Pandects, particularly a passage of Julian. The effect of the passage in question may be stated thus :

'A custom long observed by the Roman People, is equivalent to a *lex* or statute which the people formally establish. For the *written* statute is legally binding, because the Sovereign People, by *certain formalities*, manifest their pleasure that it shall legally bind.

'And the *unwritten* custom is also a positive law, inasmuch as the people, by *their observance of it*, manifest their pleasure that it *shall* be a positive law.'

The passage itself runs in the following manner :

'Inveterata consuetudo pro lege non immerito custoditur : Et hoc est jus, quod dicitur *moribus constitutum*. Nam quum ipsæ leges nullâ aliâ ex causâ nos teneant, quam quod iudicio populi receptæ sunt, merito et ea, quæ sine ullo scripto populus probavit, tenebunt omnes. Nam quid interest, populus *suffragio* voluntatem suam declaret, an *rebus ipsis et factis* ?' ⁸⁸

Without pausing to analyse the passage, I shall briefly remark on a few of the errors with which it overflows. First, it confounds an act of the people in its collective and sovereign capacity with the acts of its members considered severally, and as subjects of the sovereign whole. The laws which were made by the people in its collective and sovereign capacity, were broadly different from the customary rules which were observed spontaneously by its several and subject members. The former were *positive Law*. The latter had not the effect of *positive Law*, until they were adopted *as such* by the collective and sovereign people, or by those to whom it had delegated legislative or judicial powers.

Secondly : The position maintained in the passage is this : —That a customary rule which the people actually observes, is equivalent to a law which the people establishes formally ; since the people (*which is the sovereign*) is the immediate author of each.

Now, admitting that the position will hold, *where the people is the sovereign*, how can the position possibly apply, where the

people is ruled by an oligarchy, or where it is subject to a monarch? There, laws, established formally by the sovereign one or few, are not established by the subject many. And, on the other hand, customs observed spontaneously by the subject people, are not the production of the monarch, or of the sovereign body.

During the virtual existence of the Roman *Commonwealth*, the position maintained in the passage might have been plausible. But it is strange that the author of the passage (who lived under Hadrian and the Antonines) did not perceive its absurdity. He must have known that the Roman World was virtually governed by a monarch; and that laws established formally by that virtual monarch, and customs observed spontaneously by the subject Roman community, could not be referred (in any sense whatever) to one and the same source.

And here I would remark, by the bye, that the *juridical* meaning of the terms 'written and *unwritten Law*' arose from a misconception, by modern Civilians, of the passage which I have read and examined. The misconception is scarcely credible; since customary law and statute law are expressly referred by the passage to one and the same source: namely, the sovereign Roman People. It therefore is manifest, that the term '*jus scriptum*' is used by the author of the passage, in the grammatical or literal sense. It is applied to the *leges* passed by the Roman *populus*, because they were committed to writing, at the time of their origin, by the authority of their immediate maker. And these *leges* are *opposed* (under the name of *jus scriptum*), to *customary laws*; because the latter (in so far as they originated in the *consensus utentium*) originated *sine scripto*.

Julian's conceit exactly hits the taste of Sir William Blackstone, who borrows it with much complacency, gratefully enhancing its original absurdity by adding nonsense of his own. '*Thus*,' he remarks (after he has cited the passage),—'*thus* did they reason, while Rome had some remains of her freedom. And, indeed, it is one of the characteristic *marks* of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it was probably introduced by the *voluntary consent* of the people.'

Black-
stone's
supple-
ment to
Julian.

Now customary law (as positive law) is established by the sovereign. And, consequently, whether it be introduced (or not) by the *consent* of the people, depends upon the form of the government. If the people are the sovereign, or if they share the sovereignty with one or a few, customary law (like *other*

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law) is, of course, introduced by their *consent* (in the strict acceptation of the term): the people solely (or the people with the monarch or oligarchs) being its immediate or ultimate authors. But if the people have no share in the sovereignty, they have no part whatever in the introduction of *positive law*, be it customary or other. In the *large* sense, indeed, of the term 'consent,' customary law (like *other* law) is truly introduced by their *consent*, although the government be a monarchy or oligarchy: since they *consent* to the existence of the government, and of the laws established by the government, because they are determined by fear, or by some other inducement, to yield the government their obedience.

And under monarchies or oligarchies, as well as under governments purely or partially popular, much or most of the law which obtains in the community is (commonly) *customary* law. So that if customary law be a *mark of freedom* (or shew that the government of the community is purely or partially popular), monarchies and oligarchies are commonly democracies, or commonly partake of the democratical form. I would therefore submit, that we cannot argue that the people are free *because* their law is customary. Though if we know *aliunde* that the people are free, we may conclude that their law, whether customary or not, was introduced by their consent.

Sir William Blackstone's meaning may have been this:— That the *antecedent customs*, which are the *groundwork* of customary law, are necessarily introduced by the consent of the people: Or, in other words, are necessarily consonant to their interests or wishes.

But even this is false.

If the people be enlightened and strong, custom, like law, will commonly be consonant to their interests and wishes.

If they be ignorant and weak, custom, as well as law, will commonly be against them.

During the Middle Ages, the body of the people, throughout Europe, were in the serf or slavish condition. And this slavish condition of the body of the people originated in *custom*: Although the imperfect rights which custom gave to their masters, together with the imperfect obligations which custom imposed on themselves, were afterwards enforced by Law of which that custom was the basis. In various parts of Europe, the people have gradually escaped from the servile condition through successive acts of the Legislature. So that the body of the people in many of the European nations, have been released,

by direct legislation, from the servile and abject thralldom in which they had been held by custom, and by law framed upon custom.

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In Rome, the absolute dominion of the *paterfamilias* over his wife and descendants, arose from custom and consequent customary law, and was gradually abridged by direct legislation: namely, by the edicts of the Prætors, the laws of the People, and the edictal constitutions of the Emperors.

Let us turn our eyes in what direction we may, we shall find that there is no connection between customary law, and the well-being of the many.

In spite, then, of the grandiloquous talk by which it has been extolled and obscured, customary law has nothing of the magnificent or mysterious about it. It is but a *species* of *judiciary law*, or of law introduced by sovereign or subordinate judges as properly exercising their judicial functions. And it differs from other species of the same kind of law merely by this peculiarity; that it is formed or fashioned by the judges, who are its sources or immediate authors, upon pre-existing rules observed spontaneously, or wholly deriving their imperfect obligatory force from the religious or moral sanctions.

The motives which determine its authors to adopt these rules as law, are numberless.

But (generally speaking) the mere pre-existence of the customs upon which the law is moulded, is *amongst* those motives, if not the only one. For, if the habits and expectations of the community, or of the influential classes of the community, have been accommodated to a given custom, *that is* a strong reason for erecting the custom into Law, provided that the adjection of the legal sanction would give to the custom additional efficacy or force.

From whence it follows that *Custom* (or rather the pleasure of those, in whose observance or practice custom consists) is amongst the most frequent of the causes of Law, although it is not a source or fountain of law (taking those terms in their strict signification).

From Customary Law, I pass to positive law which is made by its immediate authors on opinions and practices of private lawyers. Law of this kind is named by the Roman Lawyers *jus prudentibus compositum*; law constructed by private jurists consulted respected for their knowledge and judgment.

The remarks which I have applied to the law styled *cus-*

Jus prudentibus compositum. Law supposed to arise from the unauthorised opin-

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ions of
private
Lawyers.

tomary, will apply (with a few variations) to that imaginary law, which is supposed to emanate from the *Auctoritas prudentium*, or from the opinions of private lawyers eminent for their knowledge and ability.

By the Roman Lawyers, these merely private though respected jurisconsults are styled *conditores* or founders of law. And by modern Civilians generally, and apparently by the Roman Lawyers, they are deemed the sources of the law, or the immediate authors of the law, which really was formed upon their opinions by legislators or judges. Positive Law of the kind in question, as well as the positive law formed upon custom, has therefore been thought to obtain as positive law, independently of sovereign authority.

But merely private jurisconsults, respected for their knowledge and judgment, are not *conditores* or founders of Law, although the weight of their opinions may determine *others* to found it. If their opinions determine the legislator, the influence of those opinions is a *remote* cause of the Law, of which the Legislator himself is exclusively the *immediate* cause, or is exclusively the *source*. But any inducement whatever, leading the legislator to establish the Law, were just as much a *remote* cause of its establishment as the opinions by which he is guided. Justinian legislated by the advice of Tribonian. He also legislated at the instance of his Empress. And the blandishments of the wife, as well as the responses of the legal oracle, were *remote causes* of laws emanating from the Emperor as their *source*.

Nay, the writings of private lawyers are not law, although it be declared by the legislator that they shall thereafter be law. For they are not law as being the production of the writers, but by virtue of the Legislator's adoption. Such, for example, is the case with those excerpts from the writings of jurists, of which Justinian's Digest is almost exclusively composed. As forming parts of those writings, they were not law; but as compiled and promulgated by Justinian, they took the quality of law immediately proceeding from the sovereign.

'Quicquid *ibi* scriptum, hoc nostrum, et ex nostrâ voluntate compositum.'—Such is the language of Justinian himself when speaking of the excerpts in the Act confirming the compilation.

If a judicial decision, introducing a new rule, be suggested by the opinion of a private lawyer, his opinion is a *remote cause*, but it is not the *source* of the rule which the decision introduces. The *source* or *immediate author* of the new rule of law, is that

Sovereign, or that subordinate judge, whose decision is determined by the authority of the legal sage.

Under the Commonwealth, the opinions of a Roman Jurisconsult derived the whole of their weight from the estimation in which he was held on account of his knowledge and judgment. His opinions naturally influenced the decisions of the tribunals, but the tribunals were not obliged to follow them.

But, according to an obscure story told in the Digest,³⁹ the tribunals were instructed (under Augustus), to take the Law, in doubtful cases, from certain jurisconsults who were appointed by the Legislature to expound it. Now, if this story be true, *these* jurisconsults ('quibus permissum erat jura condere')⁴⁰ were, in truth, judges of Law. They formed an extraordinary tribunal to which the ordinary judges were bound to defer.

And, on that supposition, their responses were judicial decisions, and not the opinions of merely private jurisconsults.

The story, however, is beset with inexplicable difficulties.

It is most probable, that the responses and writings of jurisconsults were never *sources* of Law: Although they acquired the influence which the opinions of the instructed and expert will naturally obtain.

If an ignorant and incompetent judge be swayed by the opinions of a learned and able advocate, the law, which his decisions might introduce, are *his* law. It would flow from *him*, as from its *source* or immediate author, although the knowledge, enabling him to decide, would be poured into his mind by the learned advocate who predominated over him from the bar of his own tribunal.

The law introduced by judges on the authority of private jurisconsults, and the law which they make and mould upon pre-existing custom, are merely species of the same kind. Both are judiciary law, or law introduced obliquely; and the only difference between them lies in their causes; The opinions and authority of jurisconsults being a cause of the one, as pre-existing custom is a cause of the other. In the Roman Law, the two species are distinguished by distinct names. The one is styled '*jus moribus constitutum*;' the other is styled '*jus compositum a prudentibus*, or *jus civile* (in the narrowest acceptation of the term).

Customary law and law suggested by the opinions of jurisconsults compared.

In the language of our own law, the two species (though distinct) are not distinguished by distinct names. For all judicial decisions which serve as precedents, are considered

³⁹ Digest, i. 2, 2, § 47.

⁴⁰ Inst. i. 2, § 8.

as *evidence* of Law established by Custom. And, by consequence, all judiciary law (though its *causes* are various) is named after the *source* from which it is feigned to emanate. All of it is styled *customary* law.

In neither system, does statute law, or law established directly, take various names in respect of its various *causes*. Whether it be made upon pre-existing custom, or whether (as often happens) it be made (in effect) by lawyers, it is considered as emanating from the legislator who is its immediate author, and is named accordingly. For, here, the *source* is more obvious than where the law is judiciary; and the confusion of the *sources* with the remote *causes* of law, is consequently avoided.

The *jus a prudentibus compositum* (though not marked, with us, by a distinct name) is not a stranger to our own law.

For example; much of the law in my Lord Coke's writings, consists (in the language of Hale) 'of illations made by the writer upon existing law:' much of it, of positions and conclusions founded upon the writer's notions of general Utility. For (as he says himself over and over again) '*argumentum ab inconvenienti plurimum valet in lege.*' And, undoubtedly, many of these illations and conclusions of this most illustrious of our *prudentes*, have served as the basis of judicial decisions, and have thus been incorporated with English judiciary Law.

The only difference (in this respect) between our own and the Roman Law, lies in the different turns given to the expression.

With the Romans, judiciary law, bottomed in such illations and conclusions, would at once be referred to its remote cause. It would be styled *jus a prudentibus compositum*.

With us, the authority of the *prudentes* is affectedly sunk; and the judicial decisions, really framed upon their opinions, are considered *declarations* of Law established by immemorial custom.

Again: Much of the law of real property is notoriously taken from opinions and practices, which have grown up, and are daily growing up, amongst conveyancers. And, I may observe, that the body of eminent conveyancers for the time being, is a partial picture (in little) of that body of eminent juriconsults who (at any given period) were the *prudentes* in ancient Rome. Neither the eminent conveyancers, nor the *prudentes*, can be considered as *sources* or authors of Law. But the opinions of both, as determining the decisions of the tribunals, may be considered as *causes* of that law, which (in spite

of the puerile fiction about immemorial usage) is notoriously introduced by judges acting in their judicial capacity.

With regard to the responses of the jurisconsults, to whose opinions the tribunals were bound to defer, I remarked (in a former Lecture), that the responses of these jurisconsults, when given in answer to the inquiries of the tribunals, were properly judicial decisions:—judicial decisions of extraordinary judges, who were appointed by the sovereign to determine questions of Law, when the ordinary judges should find themselves at fault.

Consequently, the authors of these responses were properly *juris conditores*. ‘*Nam eis hoc majestas imperialis permisit.*’

Whether such extraordinary referees were ever really appointed, is one of the most difficult questions which the history of the Roman Law presents.

Strictly speaking, customs, or writings and opinions of lawyers, are Law in so far as they have been recognised by judicial decisions, and no further. As we have already shewn, there can be no law without a judicial Sanction, and until a custom has been adopted as Law by Courts of Justice, it is always uncertain whether it will be sustained by that sanction or not.

Where, however, the positions of a legal writer have been in part adopted, the rest of his doctrines are ordinarily considered as Law, in so far as they are related by consequence or analogy to that which has been actually recognised. In consequence of this relation, it is probable that it *will be recognised* should a question ever arise, and it is therefore acted upon with almost as much assurance as if it had actually received the judicial approbation. Strictly speaking, it is not Law, but it probably *will be* Law, should the acts which are done in pursuance or in contravention of it, be ever brought in question before a Court of Justice.

And it must be observed, that the probability of its receiving such adoption increases with the number of acts which have been done in pursuance of it. A natural reluctance on the part of the Courts to defeat the expectations which its being regarded as law have begotten, determines the tribunal to adopt it almost independently of its connection in the way of consequence or analogy with already existing doctrines. The authority of lawyers, numerous and experienced, has here great weight.

Having thus entered upon the examination of the laws supposed to emanate from custom, from the private or un-

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authorised lawyers, and from the fancied legislatrix, nature, I have now examined the two former of these three kinds of supposed law, and endeavoured to demonstrate that custom is not a source or fountain of law, although the law styled customary is fashioned on a pre-existing custom by sovereign or subordinate judges; and that private or unauthorised lawyers are not founders of law, although the laws of which they are styled the founders, are introduced by judicial decisions, which their opinions determine or influence. In accordance with the plan set out at the commencement of this Lecture, I should next proceed to examine the laws which are said to emanate from nature, and to shew that the law styled natural, like all other law, is introduced by the sovereign as legislating, or as judging, or by legislatures or tribunals which derive their powers from the sovereign.

But it will be convenient to postpone the complete examination of the laws styled natural, and the distinction made between laws natural and positive, until after I have explained the *jus gentium* of the earlier Roman lawyers, and the distinction between *jus gentium* and *civile*, as made by them and by the classical jurists.

God or
nature not
a source of
positive
law.

Reserving the examination of the law styled natural, I shall here content myself with remarking that God or nature is not a source of law in the strict sense; that is, of law established by the sovereign or state immediately or remotely. God, or nature, is ranked among the sources of law, through the same confusion of the sources of law with its remoter causes, which I pointed out in treating of the law supposed to emanate from custom, and of the law supposed to emanate from private lawyers or juriconsults. Taking the principle of general utility as the only index to the will of God, every useful law set by the sovereign accords with the law set by God, or (adopting the current and foolish phrase) with the law set by nature; or, assuming the existence of a moral sense, every law which obtains in *all* societies, is made by sovereign legislatures on a Divine or natural original: But in either case it is a law, strictly so called, by the establishment it receives from the human sovereign. The sovereign is the author of all law strictly so called, although it be fashioned by him on the law of God or nature; just as customary law is established by the sovereign, although he fashions it after a pre-existing custom. God, or nature, is the remote cause of the law, but its source and proximate cause is the earthly sovereign, by whom it is *positum* or established.

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Extension
of 'source'
to every
'remote
cause' of
Law, leads
to con-
fusion.

The 'jus quod natura inter omnes homines *constituit*,' the 'jus moribus *constitutum*,' and the 'jus a prudentibus *conditum sive compositum*,' are manifestly in the same predicament. Each derives its distinctive name from its remote cause or one of its remote causes. And deriving its distinctive name from a cause *leading* to its establishment, it is supposed to *emanate* from that cause *as from its fountain or source*, and to exist as Law (strictly so called), independently of the position or institution which it receives from the sovereign or state.

The grossness of this confusion of ideas may be shewn briefly and clearly by a familiar example. In common talk, though not in technical language, an Act of our own Parliament is sometimes named after the person who proposed it or introduced it as a bill. Now since it derives its name from the Lord or Commoner who introduced it, and since its introduction by him was amongst the causes leading to its enactment, it follows (by analogy) that he, and not Parliament, was its source or author. Grenville or Eldon was clearly the *conditor* or founder of Grenville's or Eldon's Act. For is it not *called* Grenville's or Eldon's Act, and did not the introduction of the bill by Grenville or Eldon precede the act of the Legislature?

According to the suppositions which I have now examined, Customary Law, and law formed on the opinions of private lawyers, obtain *as positive law* independently of sovereign authority.

Supposi-
tion that
the sove-
reign
merely *de-
clares* pre-
existing
law
criticised.

By certain writers on general jurisprudence, a similar supposition has been made in respect to *all* law. The law (say they), which obtains in any community is not arbitrary or capricious. It is caused by the circumstances in which the society is placed; or the sovereign is determined to make it, and to make it what it is, by those very circumstances. The Sovereign, therefore, is not the *author* of Law, but merely *describes* or *defines* Law already made to his hand.

From whence it follows;

That a *law*, and the *reason* which determines its author to make it, are one and the same thing: And that if any private man conceive and describe a law, which hits the circumstances in which the society is placed, that project of his is parcel of the law of the land, and *he* a legislator and monarch.

The origin of this absurd speculation is obvious. Much of the positive law obtaining in any community is Custom turned into Law by the adjection of the legal sanction. Now, in this case, it may be said, in a certain sense, that the sovereign

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describes or defines law pre-existing ; especially if the custom, as adopted by the sovereign, take the shape of a statute. The rule existed as custom in a comparatively vague form, and is described more accurately in the statute. Though it is manifest that if the sovereign merely described the custom, that description would not make it Law. The description, completion, and correction of positive morality, are as much an end for which political government is wanted, as the obtaining, by its establishment, a more cogent sanction.

But the Sovereign makes it law, not by the mere description, but by the sanction with which he clothes it.

LECTURE XXXI.

JUS GENTIUM.

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I NOW proceed to consider the *jus gentium* of the earlier Roman lawyers, and the distinction between *jus gentium* and *civile*, as understood by them and by the classical jurists. My chief motive for this inquiry is the intimate connexion of the Roman *jus gentium* with equity, when equity means a department of positive law, and not some standard to which, in the opinion of the writer or speaker, positive law should conform, nor the arbitrary pleasure of judges, deciding against law, nor the species of judicial legislation in the guise of interpretation or construction, by which the precepts of some positive law are extended or restricted. The equity of which I am now speaking includes as well the Roman *jus prætorium* as our own equity ; the one introduced by the edicts of the Prætors in the way of direct legislation : the other by English Chancellors, as judges exercising their extraordinary jurisdiction. As I shall hereafter shew, neither of these is a law of a distinct class. The *jus prætorium* is statute law, or law in the direct form, emanating from a subordinate legislature : our own equity is partly Acts of Parliament, partly law introduced in the judicial manner by decrees of exception, or decisions of an extraordinary tribunal. All the cant and jargon by which the subject has been obscured, arises from the name. This portion of the law is called equity ; and equity, as denoting prætorian and chancery law, is frequently understood by talkers and writers on the subject in one of the other and numerous meanings which are attached to that slippery expression. By stating the history of the phrase, I shall be

enabled to dispel the darkness in which it is involved ; but in order to state the history of the term equity, I must explain the original meaning of *jus gentium*, and the meanings which may afterwards be annexed to that term and to the partly corresponding, partly disparate expression, *jus naturale*. I shall accordingly deal with these subjects in the following order.

First ; I shall endeavour to explain the meaning of the term *jus gentium*, as understood by the Roman lawyers, before they imported into their own system of positive law, notions or principles borrowed from the philosophy of the Greeks.

Secondly ; Having explained the meaning of the term as understood by the earlier Roman Lawyers, I shall state its meaning as used by Justinian in the Institutes and Pandects, or rather as used by the jurists styled classical, of whose writings, or excerpts from whose writings, the Institutes and Pandects are principally composed.

To these lawyers, who lived between the birth of Cicero, or of his friend Servius Sulpicius, and the reign of Alexander Severus in the beginning of the third century, the Roman law owes the regularity and symmetry of its form and the matchless consistency of its parts. But in spite of their manly sense and admirable logic, they unluckily introduced into their expositions of their own positive system, notions or principles drawn from the Greek philosophers, with which empty declaimers have been hugely taken, but which have no connexion with the system on which they are injudiciously struck, and which we must detach from the fabric before we can perceive the beauty of its proportions, and feel a due admiration for the scientific correctness and elegance of its structure. Among these notions I am compelled to rank the *jus gentium*, or as it is often termed *jus naturale*, as understood by the classical jurists, and as it appears in the Institutes and Pandects. *Jus gentium*, otherwise *jus naturale*, differs from the *jus gentium* of the earlier Roman law, and tallies with the natural law of the moderns. Accordingly, the phrase, as used by the classical jurists, is ambiguous. It sometimes denotes that portion of positive law which forms a constituent part of every body of law ; which obtains as law in every independent society that has ascended to a state of government. But, instead of denoting a portion of positive law, it sometimes denotes the standard to which, in the opinion of the writer or speaker, positive law ought to conform.

Thirdly ; From the *jus gentium* of the older Roman law, and from the *jus gentium* or *naturale* of the Classical Jurists, I

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Different meanings of *jus gentium* at different periods.
1. Ancient Roman Law.
2. Classical Jurists.

3. Ulpian's *jus naturale*.

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shall advert to a *jus naturale* (a *mirum jus naturale* !) which I take the liberty of styling 'Ulpian's Law of Nature.'

In two or three excerpts from Ulpian which are given in the beginning of the Pandects, and one of which also occurs at the beginning of Justinian's Institutes, he opposes to that *jus gentium* which tallies with the *law natural* of the moderns, a certain *jus naturale* common to man and beast :—'Jus quod natura omnia animalia docuit.'

This last-mentioned *jus naturale* (which, as I shall shew hereafter, accords with an admired conceit of Hooker and Montesquieu) seems to have been taken by the good Ulpian from certain inept speculations of certain Stoic philosophers. Since it is peculiar to Ulpian, and since no attempt to apply it occurs in the Pandects or Institutes, it can scarcely be considered the *natural Law of the Romans*, nor can it be fairly imputed to the body of the Classical Jurists; who (heaven knows) have enough to answer for, in that they adopted from the Greeks the other *jus naturale*, and were thus the remote authors of that modern Law of Nature which has so thoroughly perplexed and obscured the sciences of Jurisprudence and Ethics.

Having premised these brief explanations, I proceed to the *jus gentium* of Roman origin, or of the Roman lawyers who preceded the Classical Jurists.

Statement
of the *jus
gentium*
of the
earlier
Roman
Lawyers.
According
to Roman
Law,
strangers
had no
rights.

According to the Roman Law, a member of an independent nation, *not in alliance* with the Roman people, had no rights as against Romans, or as between himself and other foreigners or aliens. And even a member of an independent nation, *the ally of the Roman People*, had no rights (as against Romans or foreigners), except the rights conferred on members of that nation by the provisions of the *foedus* or alliance.

When I say that the members of an independent nation, *not in alliance with the Roman People*, had no rights as against Romans or foreigners, I understand the proposition with limitations.

When a member of any such nation *was residing in the Roman territory*, it is probable that his person was protected from violence and insult : And, although he was incapable of acquiring by transfer or succession, or of suing upon any contract into which he had affected to enter, goods actually in his possession were probably *his* goods, as against *all* who could shew no title whatever. Unless we understand the proposition with these limitations, a *peregrinus* or alien, not a *socius* or ally of the Roman people, was obnoxious to murder and spoliation at every instant, when dwelling on Roman soil.

In short, the condition of such an alien, *when residing on the Roman territory*, probably resembled the condition of an alien *enemy*, living within the ligeance of our own King. The latter is protected from bodily harm and spoliation, although he is generally incapable of suing in the Courts of Justice, and although it is said (in loose language) that he has *no rights*.

I believe it is now usual, on the breaking out of a war, for the King to grant a special permission to the enemy's subjects to reside in the country; and under this permission they have the same rights as alien friends. But Lord Coke lays it down positively, that an alien enemy has no rights; by which it can only be meant that he has not the right of suing in our courts, just as a person outlawed is commonly said to carry *caput lupinum*, although there is no doubt that to kill him intentionally would be murder.

But, taking the proposition with the limitations which I have just suggested, the members of an independent nation, not in positive alliance with the Roman people, had no rights, which the Roman Tribunals would enforce. For although they were not *positively* enemies of the Roman People, neither were they positively its allies or friends. And, agreeably to the maxim which prevailed in every nation of antiquity, they were therefore considered by the Roman Law as not existing.

This unsocial maxim (of which there are vestiges even in Modern Europe) obtained in the Roman Law from the very foundation of the city to the age of Justinian. It is laid down broadly in an excerpt in the Pandects, 'that every people, not in alliance with *us*, keep everything of *ours* which they can contrive to take; whilst *we*, in return, appropriate everything of theirs which happens to fall into our hands.' 'Si cum gente aliquâ neque amicitiam, neque hospitium, neque *fœdus amicitiae causâ factum* habemus, hi *hostes* quidem non sunt. Quod autem ex *nostro* ad eos pervenit, illorum fit; et liber homo *noster* ab eis captus servus fit *eorum*. Idemque est, si ab *illis* ad *nos* aliquid perveniat.'

It may therefore be affirmed generally, that, according to the Roman Law (and according to the law of every nation of antiquity), the members of a foreign and independent community had no Rights: Rights which they might have acquired by virtue of any positive alliance, being created specially by the provisions of the particular treaty, and by way of exception from the exclusive and general maxim.

From the *purè peregrini* or aliens (or from members of Condition of aliens,

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XXXImembers
of con-
quered
nations.

foreign and independent nations), I turn to the members of the communities which formerly had been independent, but which had been subdued by the Roman arms, and brought into a state of subjection to the Roman Commonwealth.

The members of an independent community subdued by the Roman arms, were placed in a peculiar position. They were not admitted to the rights of Roman Citizens, nor were they reduced to the servile condition and stripped of *all* rights. Generally speaking, they retained their ancient government and their ancient laws, so far as the continuance of those institutions consisted with a state of subjection to the Roman Commonwealth.

It is clearly laid down in the Digests, that, unless the sovereign legislature has specifically directed the contrary, the judge shall consult, in the first instance, the law peculiar to the particular region: And that the Law of Rome itself ('*jus quo urbs Roma utitur*') shall not be applied to the case which awaits decision, unless the law peculiar to the particular region shall afford no solution of the legal difficulty.

Diffi-
culties
arising
from their
position.

Such being the condition of the conquered and subject nations, the following difficulties inevitably arose.

Inasmuch as those conquered and subject nations were not incorporated with the conquering and sovereign community, their members had no rights as against Roman Citizens, according to the ancient and strict law obtaining in Rome itself. For, during the period in which that law arose, those conquered and subject nations were foreign and independent societies; and agreeably to the unsocial maxim which I have already explained, their members had no rights which the Roman tribunals would enforce.

And, agreeably to the same maxim, members of one of those nations had no rights as against members of another. For, although those nations were now subject to their common sovereign, Rome, they had been foreign and independent nations, *with reference to one another*, as well as with reference to the dominant nation which had beaten and subdued them all. In consequence, therefore, of the maxim to which I have alluded, the law peculiar to any of those subject nations imparted no rights to the members of another community.

Consequently, whenever a controversy arose between a Roman and a Provincial, or between a provincial of one and a provincial of another Province, there was no law applicable to the case, and the party who had suffered the damage was left

without redress. As between Romans and provincials, or as between provincials of one and provincials of another Province, the Roman Law afforded no remedy. For the Roman Law acknowledged no rights in any but Roman Citizens.

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In either of the same cases, the particular law of any particular Province was equally inefficacious. For the people of that Province had been an independent community; whose law (like that of Rome) acknowledged no rights in any but its own members.

To meet such cases, there was a manifest necessity for a system of rules which should embrace all the nations composing the Roman Empire: which should serve as a *supplement* or *subsidiū* to the Law of Rome itself, and to each of the various systems of provincial law obtaining in the conquered territory.

Creation of
Prætor
Pere-
grinus,
to admin-
ister jus-
tice in
Italy,
between
Romans
and mem-
bers of
Italian
States, and
between
members
of any of
those
States and
members
of any
other.

The obvious and urgent want was supplied in the following manner:—

In the earlier ages of Rome, and before she had extended her empire beyond the bounds of Italy, the inconvenience which I have tried to explain inevitably arose, in consequence of the unsocial character of the old Roman Law, and of the equally exclusive character of the various systems of law obtaining in the Italian States which the Roman people had subdued. Accordingly, in addition to the ancient *Prætor* (who judged in civil questions between Roman Citizens, and agreeably to the law peculiar to the *Urbs Roma*), a *Prætor* was appointed to determine the civil cases which arose from the relations between the victorious republic and the subject or dependent communities.

This new Magistrate (who resided in Rome itself, but who seems to have made periodical circuits through the conquered States of Italy) exercised civil jurisdiction in the following cases: namely—1st, in all questions of controversies between Roman citizens and members of the Italian States which were vassals and dependents of the Roman people; 2ndly, between members of any one of these vassal states and members of any other; 3rdly, between members of subject states when residing in Rome itself; which might be considered as a distinct class of questions, because, if the parties were members of the same community, the dispute was properly decided by the law of that community.

This new magistrate was styled '*Prætor Peregrinus*.' Not because his jurisdiction was *restricted* to questions *between foreigners*; but because the questions, over which his juris-

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diction extended, arose *more frequently* between foreigners and foreigners than between foreigners and Roman Citizens : 'Quod *plerumque* inter peregrinos jus dicebat.'

In the strict sense of the term *Peregrinus*, the parties, whose causes he commonly determined, were not *peregrini*, or foreigners, but friends and vassals of Rome. But since they *had been* foreigners before their subjection to Rome, and had not been admitted afterwards to the rights of Romans, they were still entitled *peregrini* or foreigners (as distinguished from *Cives* or Roman Citizens).

As I have remarked already, it is not probable that a foreigner (in the strict acceptation of the term) could regularly maintain a civil action before any of the Roman Tribunals.

After the appointment of the *Prætor Peregrinus*, the ancient and ordinary *Prætor* was styled (by way of distinction) *Prætor Urbanus* : Partly because his tribunal was immovably fixed at Rome, and partly because he decided between Romans and Romans, agreeably to the peculiar law of their own pre-eminent City.

Law administered
by *Prætor Peregrinus*.

From the appointment of the *Prætor Peregrinus*, and the causes which led to the creation of his new and extraordinary office, I proceed to the law which he administered.

In questions between foreigners and Romans, and between foreigners of different dependent States, the *first* *Prætor Peregrinus* must have begun with judging arbitrarily. For neither the law of Rome herself, nor the law obtaining in any of the vassal nations, afforded a body of rules by which such questions could be solved.

But a body of subsidiary law, applicable to such questions, was gradually established by the successive *Edicts* which he and his successors (imitating the *Prætores Urbani*) emitted on their accession to office. This subsidiary law, thus established by the Foreign *Prætors*, was probably framed, in part, upon general considerations of general utility. But, in the main, it seems to have been an *abstractum* (gathered by comparison and induction) from the peculiar Law of Rome herself, and the various peculiar systems of the subject or dependent nations.

Perpetually engaged in judging between foreigners and citizens of Rome, and between foreigners of *different* dependent States, these magistrates were led to compare the several systems of law which obtained in the several communities composing the Roman *Empire*. And, comparing the several systems obtaining

in those several communities, they naturally extracted from those several systems a system of a liberal character; free from the narrow peculiarities of each particular system, and meeting the common necessities of the entire Roman World.

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This body of law, thus introduced by successive edicts, acquired the name of *jus gentium*, and this was the meaning originally annexed to that ambiguous and obscure expression.

It probably acquired this name for one of the following reasons:—*First*, as extending to all communities (including Rome itself) which formed part of the Roman Empire, it was properly *jus gentium* or *jus omnium gentium*, as opposed to the law peculiar to Rome and contradistinguished from the law of a single dependent State. This is the likeliest origin of the expression. *Secondly*, though applied between Romans and foreigners, as well as between members of different foreign States, the questions or controversies, which it was framed to meet, naturally arose *plerumque inter peregrinos*; but *peregrini* or foreigners when contradistinguished from *Romani cives*, are frequently styled *gentes*. Thus, *Cives* and *gentes*,—Jews and gentiles,—“*Ἕλληνες καὶ Βάρβαροι*,—express distinctions precisely similar; they denote persons other than the countrymen of the person employing them, as opposed to his own countrymen. *Jus gentium*, therefore, does not denote law obtaining universally or generally, but law conversant about *gentes* or foreigners—namely, those foreigners who were subjects of the Roman People and with whom it was most concerned.

Origin of
the term
*jus gen-
tium*.

Extending to all the nations, which composed the Roman Empire, and not being peculiar to one community, it was also entitled *jus æquabile*, *jus æquum* or *æquitas*, that is, universal or general law as opposed to partial or particular. Nothing can be homelier than the origin of the term equity, or less related to the jargon in which it has subsequently been involved. But instead of denoting this universal or equable law, *æquitas* sometimes denoted conformity to that law; as *justitia* denoted conformity to *jus*. Since the law denoted by the term equity, or the law conformity to which was denoted by the term equity, was a law of an impartial or liberal character, equity came by a natural transference of signification, to mean fairness. It was consequently used by every innovating judge, who sought to cover his innovations by a specious and imposing name; and by this obvious and effectual artifice, the term was extended from the law established by the *prætores peregrini*, to the law created by the ordinary prætors, and by our own chancellors.

Origin of
the term
equity.

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Extension
of the *jus*
gentium
treated by
the *Præ-*
tores pere-
grini to
the out-
lying pro-
vinces.

After the dominion of Rome had extended beyond Italy, the *subsidiary* Law introduced into *Italy* by the edicts of the *Prætores peregrini*, was adopted and improved by the Edicts of the various Roman Governors, who (under the various names of Proconsuls, Prætors, Proprætors, or Presidents) represented the Roman People in the *outlying Provinces*.

For the governors of these outlying provinces (like the Prætor Peregrinus, whose jurisdiction was confined to Italy, and like the proper magistrates of the Roman People) were tacitly or expressly authorised to legislate, as well as to judge; '*jus edicere*' as well as '*dicere*.'

As between Provincials of his own province, the governor of an outlying province regularly administered the law which had obtained in the province before its subjection to Rome. As between Romans and Romans residing within his province, he regularly administered the law peculiar to Rome herself. But neither the peculiar law of his own province, nor the peculiar law of Rome (in its old and unsocial form), would apply to civil cases between Romans and Provincials or between Provincials of different provinces.

In questions, therefore, between Roman Citizens and Provincials, or between Provincials residing in his province (*but belonging to different provinces*), he administered the subsidiary law created by the *Prætores Peregrini*, or a similiar subsidiary law created by himself or his predecessors. Consequently, *before* and *after* the dominion of Rome had extended beyond Italy, a law was administered in Italy (by the *Prætores Peregrini*) in aid of the law peculiar to Rome herself, or to any of the Italian communities which Rome had subdued. *After* the dominion of Rome had extended beyond Italy, the same or a similar law was administered in the outlying provinces (by their respective Presidents or Governors), in aid of the law peculiar to Rome herself, or of the law obtaining in any of those provinces before its subjection to the conquering City. And this subsidiary law, thus administered in Italy and in the outlying provinces, was applied to civil questions between citizens of Rome and members of the nations subject to Rome, or between members of any of those nations and members of any other.

Since the want which led to the creation of this subsidiary law was the same in Italy and the outlying Provinces, and since all its immediate authors were representatives of the same sovereign, it naturally was nearly uniform throughout the Roman World, notwithstanding the multiplicity of its sources. The

Resumed
statement
of the sub-
sidiary law
obtain-
ing in
Roman
Empire.

Uniform-
ity of this
subsidiary
law
through-
out the
Roman
Empire.

Presidents of the outlying provinces naturally borrowed from the Edicts of *Prætores Peregrini*; and the *Prætores Peregrini* as naturally adopted the improvements which the Edicts of those Presidents introduced.

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As distinguished from the system of law which was *peculiar* to Rome herself, and also from the systems of law which were respectively *peculiar* to the subject or dependent communities, this subsidiary law was styled *jus gentium*, or *jus omnium gentium*: the law of *all* the nations (including the conquering and sovereign nation) which composed the Roman World. As being the law *common* to these various nations, or administered *equally* or *universally* to members of these various nations, it was also styled *jus æquum*, *jus æquabile*, *æquitas*: Though the term '*æquitas*' seems to have denoted properly, not this common or equal law, but *conformity* or *consonance* to this common or equal law; as the more extensive but analogous term *justitia* signifies conformity or consonance to any *jus* or *law* of any kind or sort. And the *jus gentium* which I have now attempted to describe, was the only *jus gentium* that was known to the Roman Law, till the *jus gentium* or *naturale*, which occurs in Justinian's compilations, was imported into it, by the jurists who are styled Classical, from speculations of Greek Philosophers on Law and Morals.

This subsidiary law was styled *jus gentium*, *jus æquum*, etc.; and was the *jus gentium* of the earlier Roman Lawyers.

Originally, the *jus gentium* which I have attempted to describe, was not parcel of the *proper* Roman Law, or the law *peculiar* to Rome herself.

But the first arose in an age comparatively enlightened, and was a product of large experience; whilst the last had arisen in an age comparatively barbarous, and was a product of narrow experience. The *jus gentium*, therefore, was so conspicuously *better* than the proper Roman Law that naturally it gradually passed into the latter; or became incorporated with the latter.

It influenced the legislation of the *Populus*, *Plebs*, and Senate; it influenced the opinions held and emitted by the *Prudentes*; and (above all) it served as a pattern to the *Prætores Urbani*, in the large and frequent innovations which they made by their general edicts, upon the old, rude, and incommodious law peculiar to the *Urbs Roma*.

So much indeed of the *jus gentium* passed into the *jus prætorium* (or the law which the *Prætores Urbani* created by their general edicts), that one of the names given to the latter was probably transferred to it from the former. It probably was named *æquitas* (or *jus æquum*) after that *æqual* or *common*

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Æquitas
the term.

law, from which it had borrowed the bulk or a large portion of its provisions.

The law formed by the Edicts of the *Prætores Urbani* (or the Prætors who sat immovably in the *Urbs Roma*, and administered justice between Roman Citizens) was commonly called *jus prætorium*. But having borrowed largely from the *jus gentium*, it was also styled, like the *jus gentium*, '*æquitas*.' A name which was extended to it the rather, for this reason:—that *æquitas* had become synonymous with *general utility*; and that the *jus prætorium* (when contrasted with the old law, to which it was a corrective and supplement) was distinguished by a spirit of impartiality or fairness, or by its regard for the interests of the weak as well as for the interests of the strong: *e.g.*, It enlarged the rights of women: gave to the *filius familias* rights against the father; to the members of the subject States rights against Roman Citizens.

Jus Civile
as opposed
to *Jus*
Gentium
of Roman
origin.
Near equi-
valence of
that distinction to
'*jus civile*
et *jus præ-*
torium.'

Now after the incorporation of the *jus gentium* with the proper Law of the *Urbs Roma*, the latter was distinguishable, and was often distinguished, into two portions—namely, the *jus gentium* which had been incorporated with it, and that remnant of the older law which the *jus gentium* had not superseded. As being proper or peculiar to the City of Rome, this remnant of the older law (when contradistinguished from the *jus gentium*) was styled *jus civile*: that is to say, the proper or peculiar Law of that *Civitas* or Independent State. Though (as I shall shew hereafter) *jus civile* (taken in a larger meaning) included the whole of the Roman Law: the *jus gentium* which it had borrowed, as well as the *jus civile* (taking the expression in the narrower meaning) upon which the *jus gentium* had been superinduced.

This distinction between *jus civile et gentium* (as denoting different portions of the more recent Roman Law) nearly tallied with the distinction between *jus civile et prætorium*. For first; Though much of the *jus Prætorium* (or the law introduced by the edicts of the *Prætores Urbani*) was not suggested to its authors by the *jus gentium*, most of it was naturally formed upon the model or pattern which that *jus æquum* presented to imitation.

Secondly; although the incorporation of the latter with the Law of the *Urbs Roma*, was partly accomplished by acts of the *Populus*, *Plebs*, and Senate, still it was principally effected through the edicts of the *Urban Prætors*: By whom (as I shall shew in a future Lecture) the business of Civil Legislation was mainly carried on.

Now as most of the *jus prætorium* consisted of *jus gentium*, and as most of the *jus gentium* (imported into the Roman Law) was imported by the edicts of those Prætors, it is not wonderful or remarkable (considering the clumsy manner in which language is usually constructed) that *jus Prætorium* and *jus gentium* were considered synonymous expressions:—that the distinction between *jus civile et jus gentium*, and the distinction between *jus civile et jus prætorium*, were considered as equivalent distinctions (although, in truth, they were disparate).

And (for the same reason) the extension of the term *Æquitas*. 'æquitas' was restricted to the *jus prætorium*; though the term *might* have been extended to a *lex*, or a *Senatus-consultum* which had borrowed its provisions or principle from the *jus gentium*.

The *jus gentium* therefore of the earlier Roman Lawyers, was the common law of the community composing the Roman world, as contradistinguished to the particular systems which were respectively peculiar to those several communities or *gentes*.

But in consequence of this incorporation of the *jus gentium* with the law peculiar to the *Urbs Roma*, the *jus gentium*, as a separate system, eventually disappeared. For the proper Roman Law, having adopted and absorbed it, became applicable to the cases which it had been made to meet: That is to say, to civil questions between Citizens of Rome and members of the communities which Rome had subdued, or between members of any of those communities and members of any other. And, by consequence, the office of the *Prætor Peregrinus* thereafter fell into disuse; and the Edicts of the Presidents in the various provinces were thereafter exclusively occupied with purely provincial interests.

Absorption of *jus gentium* by proper law of *Urbs Roma*.

The Roman Law having absorbed the *jus gentium*, and tending in every direction to universality, had now put off much of its exclusive character. Although that older portion of it, which was marked with the distinctive name of *jus civile*, was still the peculiar law of Roman Citizens, much of the later law introduced by the people and Senate, and more of the law established by the Urban Prætors, was adapted to the common necessities of the entire Roman world. Hence the Law of the *Urbs Roma* (though originally the peculiar law of the dominant City) was applied (*in subsidium*) to cases between Provincials, although the contending parties were members of the same province, and were actually within the jurisdiction of its peculiar tribunal. Owing to the character of universality which it thus

Causes of fitness of Roman Law for a *Welt-Recht*, or universal Law.

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acquired, and which was afterwards heightened by the labours of the Classical Jurists, the Roman Law (though the law of a single people living in a remote age) has obtained as auxiliary law in the nations of Modern Europe, or has been incorporated with their own peculiar systems.

And here I would remark that a common law or *jus æquum*, nearly resembling the *jus gentium* in question, has obtained in almost every nation with which we are acquainted.⁴¹ For every system which is common to a limited number of nations, or to all the members of a single nation, is a *jus gentium* (as the phrase was understood by the earlier Roman Lawyers) when opposed to the particular systems of those several communities, or to the particular bodies of law obtaining in that one community.

Wherever, in short, there coexist various systems of particular law, and a general system, there is a *jus gentium* (in the sense of the older Roman Lawyers).

From the *jus gentium* of the older Roman Law I pass to the *jus gentium*, otherwise *jus naturale*, of the Institutes and Pandects.

The *jus gentium* or *naturale* of the Institutes and Pandects compiled by Justinian, has little or no connexion with the *jus gentium* explained above. The *jus gentium* of the Institutes and Pandects was imported into the Roman Law from the systems of the Grecian philosophers by the jurists styled classical: that is, the jurists who lived and wrote during the period intervening between the birth of Cicero, and the reign or death of the Emperor Alexander Severus, and of whose writings the Institutes and Pandects are almost entirely composed. Servius Sulpicius, the friend of Cicero, is generally, I believe, considered the first of the classical jurists; Ulpian, who held

⁴¹ (E.g.) Roman Law as subsidiary law of a limited number of modern nations. General Feudal Law (or *abstractum* contained in *Libri Feudorum*) as subsidiary law of a limited number of modern (or middle age) nations.

Jus commune Germanicum, since the dissolution of the Empire.

Law Mercantile.

Canon Law.

Jus commune Germanicum, before dissolution of Empire.

Law contained in General Prussian Code.

Common Law of United States of

America, which is applied by Federal Courts in cases over which the Constitution has given them jurisdiction, in default of law made or specified by the Constitution or by Congress.

Common Law of England, as originally understood: though original idea now cut down to Law judiciary—not made on statutes—administered by Courts of Common Law, and obtaining as Law throughout the Realm.

Falck, § 124. Blackstone, vol. ii. 44; vol. iv. 67.

Du Ponceau's Jurisdiction of Federal Courts.

the post of *Præfectus annonæ* and other offices under Alexander Severus, closed the series. They are esteemed classical probably because many of them lived in the time of Augustus or in the classical ages which immediately succeeded him, and those who lived at a later period retained the classical manner. The latin of Ulpian, though too declamatory for my taste, is by many esteemed the best latin in the Pandects.

It is said in the Pandects and Institutes of Justinian, and also in the Institutes of Gaius (from which Justinian's Institutes were principally copied), that every independent nation has a positive law and morality ('*leges et mores*'), which are peculiar to itself, of which the given community is the source or immediate author, and which, as being peculiar to that given community or *civitas*, may be styled aptly *jus civile*: But that every nation, moreover, has a positive law and morality which it shares with every other nation; of which a natural reason is the source or immediate author; and which, as being observed by all nations, may be styled aptly '*jus gentium*,' or '*jus omnium gentium*.'

The distinction of *jus civile* into *jus civile et jus gentium* which was made by the classical jurists, and occurs in Justinian's compilations.

'*Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur. Nam quod quisque populus ipse sibi jus constituit, id ipsius proprium est, vocaturque jus civile; quasi jus proprium ipsius civitatis. Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peræque custoditur, vocaturque jus gentium; quasi quo jure omnes gentes utuntur.*'

And the *jus gentium* described in the foregoing passage is described in other passages in the Pandects and Institutes as the '*commune omnium hominum (sive civitatum) jus*:' the '*antiquius jus quod cum ipso genere humano proditum est*:' the '*naturale jus quod vocatur jus gentium; quod divinâ quâdam providentiâ constitutum, semper firmum atque immutabile permanet.*'

It is manifest, moreover, from the language of these passages that the *jus gentium* occurring in Justinian's compilations is the natural or *divinum jus* which occurs in the writings of Cicero; and which Cicero himself, as well as the Classical Jurists, who probably were influenced by his example, borrowed from the *φυσικὸν δίκαιον*, or natural rule of right, conceived by Greek speculators on Law and Morals.

I remarked just now, that the *jus prætorium*, or the Law created by the general edicts of the *Prætores Urbani*, borrowed the bulk, or a large portion of its provisions, from the *jus gentium* (or *jus æquum* or *commune*), which was properly of Roman origin.

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And it is not unworthy of observation, that Cicero's *jus naturale* is opposed to the *jus prætorium*, and therefore, to the *jus gentium* which was properly of Roman origin, as well as to the law which the *jus prætorium* modified, and which was strictly peculiar to the Urbs Roma.

'Non a duodecim tabulis (says Cicero,) neque a Prætoris edicto, sed penitus, ex intimâ philosophiâ, haurienda juris disciplina.'

The distinction between *jus civile* and *jus gentium* which occurs in Justinian's compilations, is speculative rather than practical.

It seems to follow from the foregoing statement, that the distinction between *jus civile* and *jus gentium*, which occurs in Justinian's compilations, is speculative rather than practical; and that the Classical Jurists introduced it into their treatises on the Roman Law, rather to display their acquaintance with the ethical philosophy of the Greeks, than because it was a fit basis for a superstructure of legal conclusions.

Accordingly, a legal inference drawn from the distinction is scarcely to be met with in any of Justinian's compilations; though, since the distinction is placed at the beginning of the Pandects and Institutes, and is there announced to the reader with a deal of formality and pother, one might naturally think it the forerunner to a host of important consequences.

Modes of acquisition *ex jure civili*, and *ex jure gentium*.

In the Institutes, indeed, of Justinian (following the Institutes of Gaius), titles, or modes of acquisition, are divided into *civil* and *natural*, or modes of acquisition *ex jure civili* and modes of acquisition *ex jure gentium*: the former, it is said, being a peculiar offspring of the system of positive law peculiar to the Roman *Civitas*; and the latter, it is said, being sanctioned legally in *all* political societies, and sanctioned morally or by custom in all societies whatever. But this division of modes of acquisition is not followed by a single inference. And (what is equally remarkable) the modes of acquiring *obligationes*, or *jura in personam*, are not divided in the same manner; though of these also, some are common to all or most systems of law, and others (such as *stipulatio*) strictly peculiar to the Roman law: while if the classification had been important legally, it would have been found in both classes of modes of acquisition. In truth the distinction between *jus gentium* and *jus civile*, as thus understood, is of no consequence at all in the Roman law. Certain obligations, the Roman jurists do style *natural*, but the word has here a singular and peculiar meaning: it denotes certain obligations which are imperfect, which the law will not enforce. In certain cases the law is said to *reprobate* a particular transaction, but will not set aside

the transaction if done against the law; and though the party may be morally bound to make restitution of any advantage which he may acquire by the transaction which the law reprobates, the law will not enforce the obligation. It is then styled a natural obligation. For instance, a gambling transaction is said to be void, and to be reprobated by the law; but if the party has paid a gambling debt, he cannot afterwards recover it.

The only instance occurring to me, in which a consequence is built upon the distinction between the *jus civile* and *jus gentium*, is the difference which I have formerly mentioned between crimes with reference to the cases in which *ignorantia juris* is an excuse. Persons belonging to the classes *quibus permissum est jura ignorare*, are not excused if they have committed an offence against *jus gentium* or *naturale*; for *jus gentium* being known *naturali ratione*, or by a moral sense or instinct, the party must have known that he was violating the law of nature, and must have surmised that he was violating the law of the State, and the plea of ignorance therefore must be false. In this case a set of inferences are deduced from the distinction, but this is the only instance which I can find.

The distinction between *jus civile* and *jus prætorium*, is just as penetrating and as pregnant with consequences as our distinction between law and equity. But, as a legal distinction, that of *jus civile* and *jus gentium* is nearly barren.

The *jus naturale* or *gentium* of the classical jurists, like the law natural of their modern imitators, is ambiguous. It sometimes means that portion of positive law which is a constituent part of all positive systems, and sometimes the standard to which, in the opinion of the writer or speaker, law should conform. For example, slavery in certain passages of the classical jurists, is said to exist *jure naturali* or *jure gentium*; for the institution of slavery was common to all nations with which the Romans were acquainted. But, in other passages, it is asserted that all men are naturally free, and that the institution of slavery is repugnant to the law of nature. Now, the law of nature which authorized slavery and that which repugns it cannot be the same law of nature, but must be set or established by hostile natures. In the one case, the writers were speaking of that which is actually an integral portion of all positive law; in the other, they were probably speaking of law as it should be, and styled the standard to which it ought to conform, the law of nature. Again, *jus civile* is defined by Ulpian and others as 'quod neque in totum a naturali vel gentium recedit, nec per

Double
meaning of
*jus
naturale*.

LECT.
XXXI

omnia ei servit: Quod itaque effcimus, cum aliquid addimus vel *detrachimus* juri communi?' Now, the *jus naturale* or *gentium* as meaning an actual part of all systems of positive law, is not susceptible of detraction or abrogation. It is *jus naturale* or *jus quo omnes gentes utuntur*; precisely, because it is in force everywhere. If it were abrogated in any system, it would lose the universality which is essential to its existence. The phrase, therefore, must here mean something else; probably the standard, the law of God, as indicated *naturali ratione*.

Of *jus gentium* as signifying international morality.

Before I conclude, I shall advert to certain meanings of *jus gentium* different from those which I have explained. It sometimes seems to include positive morality, as well as positive law, especially that part of positive morality which is styled international law, and which is supposed to be a constituent portion of all positive morality. As including all law, and all morality supposed to be general or universal, the phrase *jus gentium* necessarily includes that morality which exists *inter gentes*. It is not certain that the phrase is ever used in this sense by the Roman Jurists, but certainly Livy and Sallust so employ it. International law is styled by Gaius, as by Grotius and others of the moderns, *jus belli*; by other Roman jurists it is termed *jus feciale*; and even by Livy and Sallust *jus gentium* is not applied specially to international law, though it includes that with many other objects.

In some modern treatises, almost any system of law which enters into many positive systems, is styled *jus gentium*. Spelman, for example, styles the feudal law the *jus gentium* or law of nature of this western world. The same notion which the Roman Jurists expressed by the term is here applied on a different scale. In the same manner the name *jus gentium* might be given to the Roman Law as applied in the states of modern Europe, since it forms a part of almost all their systems of law.

Ulpian's *jus naturale*.

Agreeably to the plan which I have sketched in the outset of this lecture, I should next examine the *jus naturale*, which I style, for the sake of distinction, *Ulpian's* law of nature—a law which, according to him, is common to man and beast; and which he contradistinguishes from that *jus gentium* or *naturale*, which tallies with the law natural of modern jurists and moralists.

But since Ulpian's law natural is peculiar to himself, since it only occurs in two or three passages of Justinian's Institutes and Pandects, and has little influence upon the matter, or even

upon the *form*, of the Roman Law, I shall not occupy your time with it.

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Did it not stand at the *beginning* of the Institutes and Pandects, and were it not the source of certain conceits which have gotten good success, I should have dismissed it without examination. But since it occupies the foremost place in Justinian's Institutes and Pandects, and since it is manifestly the groundwork of more imposing nonsense, it possesses an extrinsic or accidental importance which demands a passing and brief notice.

LECTURE XXXII.

LAW NATURAL AND POSITIVE.

FROM the *jus gentium* of the earlier Roman Lawyers I proceed to the distinction of positive law into natural and positive, as the distinction is commonly understood by modern writers on jurisprudence.

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The distinction of positive law into natural and positive, as commonly understood by modern writers on jurisprudence. *Rationale* of the distinction.

The *rationale* of this distinction may, perhaps, be conceived and expressed in the following manner.

The positive laws of any political community are divisible into two kinds :

Some it would probably observe as moral or customary rules, although it were a *natural* society (or a society *not* political), and although it were also in the savage state which commonly accompanies the absence of political government. For they rest upon grounds of utility which are strikingly obvious; and which extend, moreover, through all societies (natural or political, savage or refined). The positive laws, for example, which, in political societies, shield the lives of the citizens, are admitted as moral rules, and commonly are observed as such, even by the members of the natural societies which have not ascended from the savage state.

There are others of the positive laws obtaining in a political community, which it would *not* observe as moral or customary rules, if it were a natural society, and were also in the savage condition. For some of the positive laws obtaining in a political community, suppose that the given community is a political community; and therefore could not obtain in it if it were a natural society. Such, for example, are the positive laws which determine the powers and duties of the ministers of justice, and

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of the other political or public persons subordinate to the sovereign government.

Some, moreover, of the positive laws obtaining in a political community, would probably be useless to a natural society which had not ascended from the savage state. And others which might be useful even to such a society, it probably would not observe; inasmuch as the ignorance and stupidity which had prevented its submission to political government, would probably prevent it from observing every rule of conduct that had not been forced upon it by the coarsest and most imperious necessity.

The positive laws, therefore, of any political community are divisible into two kinds.

Some it would probably observe as moral or customary rules, although it were a society not political, and also had not ascended from the savage state. Others it certainly or probably would *not* so observe, if it were a natural society, and were also in the savage condition.

The positive laws, moreover, of any political community may be distinguished in the following manner :

Some are peculiar or proper to that single political community, or, at least, are not common to all political communities. Others are common to all political communities, or form a constituent part of every positive system.

But it is probable that some of the laws which obtain as positive laws in all political communities, would obtain as moral rules in any political community, although it were a natural society, and living in the savage condition. For, since there are political communities that scarcely have ascended from the savage state, it is probable that some of these laws rest upon grounds of utility which are strictly universal and also strikingly obvious : which extend through all societies (natural or political, savage or refined), and which even a natural society, in the rudest condition of humanity, could hardly fail to perceive.

Now the positive laws which are common to all political communities, and which, moreover, are universally and palpably useful, are apparently the 'natural laws' usually contemplated by modern writers on jurisprudence when they mean by the expression 'natural laws' a kind of the laws that are properly the subject of their science.

The rationale of the distinction of positive laws into natural laws and positive laws, may therefore be stated thus.

The former are common to all political societies, in the

character of positive laws: and being palpably useful to every society whatever, they are common to all societies, political or natural, in the character of moral rules.

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The latter are not common, as positive laws, to all political societies; or though they be common, as positive laws, to all political societies, they are not common, as moral rules, to all societies (political or natural).

And here I would remark that the natural law in question when considered as positive law, is closely analogous to the *jus gentium* of the earlier Roman Lawyers, and to any of the systems of common or general law which resemble their *jus gentium*. For the natural law in question is the common positive law of all independent nations; and the *jus gentium* of the earlier Roman Lawyers, or any of the systems of general law which resemble their *jus gentium*, is a common positive law of a comparatively restricted extension: being common to a limited number of independent nations, or common to all the members of a single independent nation.

This natural law, as positive law, is closely analogous to the *jus gentium* of the earlier Roman Lawyers, etc.

But it must be remarked that the natural law of modern writers on jurisprudence (like the *jus gentium* or *naturale* which occurs in Justinian's Compilations), is not restricted to positive laws, but comprises merely moral, or merely customary rules. It comprises every rule which is common to all societies, though the rule may not obtain, as positive law, in all political communities, or in any political community. And consequently, the natural law of those modern writers (like the *jus gentium* or *naturale* which occurs in those Compilations), embraces all the laws (or rules of positive morality) which are styled international laws, or the laws of nations. Or, rather, it embraces all those rules of international morality, which are not observed exclusively by a limited number of nations, but obtain, or are deemed to obtain, between all nations whatsoever.

Natural law of moderns, and *jus gentium* of Justinian's compilations, embrace positive morality (especially international) as well as positive law.⁴²

The *jus gentium*, therefore, which occurs in Justinian's Compilations, is a much larger expression than 'the law of nations' as meaning international law, or the law which obtains between nations. International morality is only a small part of the *jus gentium* in question; since it comprises every rule (be it positive and moral, or be it exclusively moral) which is common to all societies (political or natural). '*Jus feciale*' or '*jus belli et pacis*,' and not '*jus gentium*,' or the 'law of nations,' is the name which is always given to international morality, by the Roman lawyers themselves.

⁴² Falck, 283, 79; Hugo, Enc. p. 279; Gaii Comm. iii. 94.

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XXXII

Argument
for the distinction of
positive
law and
morality
into *natural* and
positive :
with purposelessness
of it, if general
utility be the only
index to
Law of
Deity or
Nature.

I have stated the modern distinction of positive laws (which includes a similar distinction of merely moral rules) into *natural* and *positive* (or natural and simply positive). But since the distinction, apparently, is utterly or nearly useless (though it rests upon a real difference between those laws and rules), I will now add to the foregoing statement of it, a short notice of the argument by which it commonly is maintained.

That current argument may be put in the following manner :

There are positive rules of conduct (legal *and* moral, or *exclusively* moral), which obtain universally, or are observed by *all* societies. But, since they obtain universally, they must have been made or shaped, by their human authors, on laws of the Deity or Nature which were known to those authors through an instinct. For varying and fallible reason, as merely informed and advised by general utility or expedience, could not have determined *all* societies to the adoption and observance of the *same* body of rules. And the inference is confirmed by this further consideration ; and these rules are observed concurrently by unconnected societies of men who have not ascended from the savage condition ; whose intelligence is scarcely superior to that of the lower animals ; and whose imbecile reason, as left to the uncertain guidance of general utility, could hardly have conducted them to a perfectly uniform result.

The human authors, therefore, of these universal rules, copied them from divine originals : which divine originals were known to those human authors, not through fallible reason led by a fallible guide, but through an instinct or sense, or through immediate consciousness.

But since their human authors copied them from divine originals, which were known to those human authors through a perfectly infallible index, they are not so properly rules of *human* position or establishment, as rules proceeding immediately from the Deity himself, or the intelligent and rational Nature which animates and directs the universe. They are properly natural rules, or rules created immediately by Nature or the Deity, although the men who are deemed their authors have armed them with additional sanctions, legal or moral.

But there also are positive rules (legal and moral, or *exclusively* moral), which are *not* universal. And since these rules are not universal, there is no ground for inferring that they were copied from divine originals, or from divine originals as known instinctively and infallibly. They either were not copied from divine or natural originals ; or they were copied from such

originals, as conjectured by the imperfect light of general utility or experience. Consequently, they certainly or probably are of purely human position : and therefore may aptly be opposed to universal and natural rules, by the epithet of positive or *merely* positive.

Though I shall not examine the argument which I have now stated, I must remark that the distinction of positive rules into natural and positive seems to rest exclusively (or nearly exclusively) on the supposition of a moral instinct; or (as this real or imaginary endowment is named by the Roman Lawyers and by various modern writers), a natural reason, or a universal and practical reason.

The distinction, indeed, is not unmeaning, although the principle of general utility be the *only* index to the laws of Nature or the Deity. For as some of the dictates of general utility are exactly or nearly the same at all times and places, and also are so strikingly obvious that they can hardly be overlooked or misconstrued, there are positive or human rules which are absolutely or nearly universal, and the expediency of which must be seen by merely natural reason, or reason without the lights of extensive experience and observation.

Assuming, then, that general utility is the only index to the laws of the Deity, the distinction answers to a difference between positive or human rules, which certainly is not imaginary, though no one can describe it precisely. For no one (I presume) can determine exactly, what positive rules are strictly universal, and which of them are merely particular.

But if the principle of general utility be the only index to the laws of the Deity, the distinction, though not unmeaning, seems to be utterly or nearly purposeless. For every human rule (be it universal or particular) which accords with the principle of utility, must accord with the Divine Law of which that principle is the exponent. So that all positive rules, particular as well as universal, which may be deemed beneficent, may also be deemed *natural* laws, or laws of Nature or the Deity which men have adopted and sanctioned.

Besides, rules which are peculiar to particular countries may be just as *useful* as rules which are common to all countries. The laws which determine the distribution of water in hot and arid climates, or which regard the construction and preservation of embankments in countries exposed to inundation, are not less *useful* (although they are limited to certain regions) than the laws which have gotten the specious name of *natural* because they are suggested by necessities pressing upon all mankind.

LECT.
XXXII

Laws imposing taxes necessary to the maintenance of political government, are not less useful than the laws which guard property or life: though the former are merely positive (as following the existence of government), whilst the latter obtain universally (in the character of moral rules), and therefore are deemed *natural*. Yet, so confused and perverse are the moral perceptions of the vulgar, that many an honest man, who would boggle at a theft, shall cheat the public revenue with a perfectly tranquil conscience.

A distinction of crimes into 'mala in se' and 'mala quia prohibita,' which, though utility be the only index to the laws of the Deity, might not, perhaps, be ill-founded.

If a law set by the state be pernicious or useless, may we break it without offence against the Law of God? The specific consequence of breaking the specific law, would (by the supposition) be harmless if not positively good. But a breach of a mischievous law tends (in the way of example) to produce offences against other laws which are decidedly beneficent. To import goods which are prohibited, for the absurd and mischievous purpose of protecting domestic manufactures, is a perfectly innocent act, with reference to its specific consequences. But since the importation of these tends generally to embolden smugglers, a man of a delicate conscience would hardly import them.

Now if an offence would be mischievous on the whole, although the violated law were itself useless or pernicious, it might be styled *malum prohibitum*, or *malum quia prohibitum*. The act would be *malum* (or an offence against the Law of God as well as the Law of Man) merely *because* the act had been prohibited by the latter, and *because* the breach of the useless or mischievous prohibition might lead to violations of beneficent obligations. If the breach of the useless or mischievous law would not be mischievous (with reference to the sum of its consequences) it would not be *malum* at all.

According to the principle of Utility, the distinction (if worth taking) would therefore stand thus: *Mala in se* are offences against useful laws: *Mala prohibita*, or *quia prohibita*, are mischievous offences against laws which are themselves useless or mischievous.

Innocuous offences against useless or mischievous laws are not *mala*: In other words, they are not pernicious; and therefore are not violations of the Law of God or Nature.

The distinction of crimes, made by the Roman Law into crimes *juris gentium* and crimes *jure civili*, tallies with the distinction of crimes made by modern writers into *mala in se* and

mala prohibita. Offences against human rules which obtain universally, are (according to these writers) *mala*, or offences *in se*, inasmuch as they *would be* offences against the law of Nature or the Deity, although they were not offences against rules of human position. But offences against human rules which only obtain partially, are *not*, according to those writers, offences against laws of nature. Or at least, they would not be offences against laws of the Deity if they were not offences against positive law or morality. And therefore they are *mala*, or offences, *quia prohibita*, or they take their quality of offences from human prohibitions and injunctions.

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I believe that no legal consequence has been built on this last distinction, by any of the systems of positive law which have obtained in modern Europe.

I will here advert for a moment to two of the disparate meanings which are annexed to the ambiguous expression 'Natural Law,' by writers on jurisprudence and morals.

Taken with the meaning which I have endeavoured to explain, it signifies certain rules of human position; namely the human or positive rules which are common to *all* societies, in the character of law and morality, or in the character of morality.

'Natural Law' as meaning certain rules of human position; and 'Natural Law' as meaning some standard to which human rules should conform.

But taken with another meaning, it signifies the laws which are set to mankind by Nature or the Deity, or more generally, it signifies the *standard* (whether that standard be the laws of the Deity, or a standard of man's imagining) to which, in the opinion of the writer, human or positive rules *ought* to conform. And by the confusion of the meaning which I endeavoured to explain, with the meaning which I now have suggested, the grossest contradiction and nonsense is frequently engendered.

The ambiguity is the same with that already spoken of in the last lecture with regard to the *jus gentium* or *naturale*, as the terms are employed by the classical jurists: for example, where the institution of slavery is at one time said to be the creature of the *jus naturale* or *gentium*, and at another to be repugnant to natural law; and where the *jus civile* is said to be the law we make when we add anything to, or detract anything from, the *law of nature*.⁴³

Before I conclude, I will offer a few remarks upon Natural Rights. (v.v.)

Natural Rights.⁴⁴

Natural Rights would naturally signify the rights which

⁴³ See pp. 565, 566, *ante*.

⁴⁴ Hugo, *Naturrecht*. Blackstone, vol. i. p. 123.

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}

correspond to Natural Law : Rights which are given by all or by most positive systems, and which would exist as *moral* rights though government had never arisen.

But by the term 'natural rights,' is frequently meant the rights and capacities which are said to be original or innate.

Now original or innate rights, and original or innate capacities to take or acquire rights, are those rights and capacities which a man has as simply being a man, or as simply living under the protection of the state. Such (for example) is the right which Blackstone styles the right to personal security, the right to reputation, or the capacity to acquire rights by conveyance or contract. Rights of this class are styled original or innate as opposed to acquired. They reside in the party without any other title or investitive event than the mere fact of his being a citizen of the community.

All other rights and capacities originate in some particular incident or *mode of acquisition*, and are again divided into those which arise out of some particular *status* or condition, and those which are said to arise *ex speciali* titulo, as by a contract ; the word title, or mode of acquisition, being confined to those incidents which do not, *uno ictu*, give a whole set of rights and capacities, such as constitute a *status*.

The rights called natural rights in this acceptation of the term, are said to be born with a man, for the reason which I have just stated. But natural rights, thus understood, are totally different from natural rights in the other sense which I before explained, namely, rights which would obtain as sanctioned by positive morality, although government had never existed. The right to reputation, for example, could hardly consist in a savage condition. Yet the right to reputation is a natural right in the sense in which natural rights are said to be innate or opposed to acquired rights.

Blackstone has confounded natural rights as taken in these two distinct senses ; and because he has styled natural rights (in the sense of rights not acquired by a particular incident) the absolute rights of persons, he has supposed them to belong to the law of persons, although, as I shall shew hereafter, rights of this class belong pre-eminently to the law of things. I suppose that he called them absolute rights of persons for the same reason which has induced others to call them natural or inherent rights ; namely, because they are not dependent on the happening of any particular incident, but we acquire them merely by being born.

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The objections to applying the term 'Law' to natural or revealed rules are two: 1st, *As* such rules they are *not* law; although it may be incumbent (morally or religiously) upon the Legislator or judge to lend them the legal sanction, and although they become law as soon as they receive it. 2ndly, Many of these natural rules and revealed principles may not be fit for *law*, although their observance as moral and religious rules is necessary to the well-being of society. These objections hold, assuming that there are any such rules.—*Marginal Note in Falck*, p. 100.

The tendency to append International Law to the so-called Law of Nature, illustrates the character of the latter. International law (so far as it is independent of usage) is a *branch* of Ethics: *i.e.* of Natural Law. But as municipal law is broadly distinguished from Ethics, even those who admitted the existence of a natural *law* were unconsciously led to touch upon it but slightly in their expositions of law municipal. Consistently with the hypothesis of a natural *law*, an exposition of a municipal system should divide it into two parts: *viz.* that which, as conforming with natural law is (not *ought to be*) Law; and that which, as conflicting with law natural, is *not* Law.—*Marginal Note in Falck*, § 139.

The ancient idea of a Law of Nations (Völkerrecht) is connected with the assumption of a Law of Nature which is universally binding, independently of political obligation.—*Falck*, § 46.

International Law, according to the above-mentioned notion, supposes a Law of Nature: *i.e.* A law obligatory upon all mankind, but wanting the political sanction. If there be no law without that sanction, the admitted maxims for the conduct of international transactions are not Law, but Ethics. Each State may, however, adopt an International Law of its own; enforcing that law by its own tribunals, or by its military force (at least), as against other nations.

This, however, is not International, but National or Civil Law; *i.e.* in regard to the sanction. For in regard to the subject, and (where there is good faith), to the object, it *may* be styled international.

If the same system of International Law were adopted and fairly enforced by every nation, the system would answer the *end* of law, but, for want of a common superior, could not be *called so* with propriety. If courts common to all nations administered a common system of International Law, this system, though eminently effective, would still, for the same reason, be a *moral* system. The concurrence of any nation in the support of such tribunals, and its submission to their decrees, might at any moment be withdrawn without *legal* danger. The moral system so administered would of course be eminently precise.—*Marginal Note in Falck*.

LECTURE XXXIII.

DIFFERENT MEANINGS OF EQUITY.

LECT.
XXXIII
Origin of
term
Equity as
meaning
Law.

As I remarked in the Lecture before the last, the original *jus gentium* is the universal and subsidiary law which was introduced into Italy by the edicts of the *Prætores Peregrini*, and was afterwards extended to the outlying Provinces by the edicts of their Presidents or Governors.

This law, introduced *in subsidium* by the edicts of these Prætors and Presidents, was styled *jus gentium*, or *jus omnium gentium*, because it was *common* to the nations composing the Roman world, and was neither peculiar to the sovereign State, nor to any of the States (formerly foreign and independent) which her victorious arms had reduced to dependence or subjection.

Being common to the nations composing the Roman world, and not peculiar to Rome or any of the subordinate communities, this law, introduced *in subsidium* by the edicts of the Prætors and Presidents, was also styled *jus æquum*, *jus æquabile*, or *æquitas*: That is to say, Law universal or general, and not particular or partial.

Equity as
meaning
impartiality.

This subsidiary law being distinguished from the peculiar systems to which it was a supplement by its comparatively large and liberal spirit, *æquitas*, which was one of its names, and which (as one of its names) indicated its *universality*, gradually came to signify *impartiality*: regard to the interest of *all* whose interests ought to be regarded, as distinguished from exclusive or partial regard to the interests of *some*.

Equity as
meaning
any law, or
principle
of legisla-
tion, which
the
speaker
means to
commend.

This is the secondary sense of the term *æquitas*, when it is used in a secondary sense with perfect propriety: Though the term is often applied, by an improper extension of its meaning, to some *system of law*, or to some *principle of direct or judicial legislation*, which the speaker or writer, for any reason, praises or commends.

Of all the various objects which are denoted by this slippery expression, the most interesting, and the most complex, are those portions of Roman and of English law, which arose from the Edicts of the *Prætores Urbani*, and from judicial decisions of our own Chancellors as exercising their extraordinary jurisdiction. And, accordingly, those portions of *Roman* and of *English Law*, are the *Æquitas*, or the *Equity*, to which I shall more especially direct my attention.

But before I proceed to 'Equity' as meaning a department of Law, I will briefly advert to a few of the other and numerous meanings which are not unfrequently attached to that most ambiguous term. For 'equity' (as meaning law) being often confounded with 'equity' as meaning something different, gross misconceptions of 'equity,' as denoting a portion or department of positive law, are commonly entertained by the simple laity, and not unfrequently by lawyers.

If I liked, I could point at books and speeches, by living lawyers of name, wherein the nature of the Equity administered by the Chancellor, or the nature of the jurisdiction (styled extraordinary) which the Chancellor exercises, is thoroughly misapprehended :—Wherein the anomalous distinction between Law and Equity is supposed to rest upon principles necessary or universal ; or (what is scarcely credible) wherein the functions of the Chancellor, as exercising his extraordinary jurisdiction, are compared to the *arbitrium boni viri*, or to the functions of an *arbiter* released from the observance of rules.

It is manifest on a moment's reflection, that, if our Courts of Equity were arbitrary tribunals, they would destroy the security, and the feeling of security, which ought to be the principal end of political government and law.

Taken in its primary sense, equity, or æquity, is synonymous with *universality*. In which primary sense it was applied to the *jus gentium* of the earlier Roman Law, because the *jus gentium* of the earlier Roman Law was *æquum*, or common, and not restricted or particular.⁴⁵ The *jus gentium* to which it was applied being distinguished by comparative fairness, equity came to denote (in a secondary sense) *impartiality*. And impartiality being good, equity is often extended (as a vague name of praise) to any system of law, or to any principle of direct or judicial legislation, which, for any reason, is supposed to be worthy of commendation.

The applications of the term 'equity' are extremely numerous. But, in almost every instance wherein it is applied, one of the meanings now indicated is the *basis* of the complex notion which the term is employed to mark. With this preliminary remark I shall proceed to enumerate certain of the senses which the term bears, when it does not denote a certain portion of positive law.

First :)⁴⁶ There is a species of interpretation or construction

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Confusion of Equity as meaning Law, with Equity in its other senses.
Supposition that 'Law and Equity' is a universal and necessary distinction.
Confusion of Equity as meaning Law, with Equity as meaning *arbitrium*.

Equity = universality.
Ergo, Impartiality.
Ergo, applicable to any good law, etc.

⁴⁵ Properly an abstraction of *æquum* (jus), but like *justitia*, is made mother of its own parent: e.g. when it means good principles of legislation.

⁴⁶ It appears from the MS. that the author intended to use the passage beginning at this line and ending at p. 583, towards the construction of an

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Equity as
meaning
extensive
(or restric-
tive) inter-
pretation,
*ex ratione
legis*.

(or rather of judicial legislation disguised with the name of interpretation) by which the defective but clear provisions of a statute are extended to a case which those provisions have omitted. As I shall endeavour to shew (when I attempt to examine the difference between direct and judicial legislation), *this* species of interpretation or construction is *not* interpretation or construction properly so called. The specific provisions of the statute, and the specific intention of the lawgiver, are perfectly unequivocal or certain. It is certain that the case is not embraced by the law, and was not present to the mind of the lawgiver when he constructed the law. But since its provisions *would* have embraced the case, if its author had pursued consequentially his own general design the judge (exercising a power expressly or tacitly given to him) completes the defective provisions actually comprised in the law; and supplies the defective intention which its maker actually entertained, from the predominant purpose or end which moved him to make the statute. The judge extends the law to the omitted case, because the omitted case falls within the general design, although it is not embraced by the actual and unequivocal provisions. Or, adopting the current but absurd expression, the judge *interprets* the law *extensively*, in pursuance of its reason or principle.

The so-called interpretation which I have briefly and loosely described is widely different from the *genuine* extensive interpretation which takes the reason of the law as its index or guide. In the latter case, the reason or general design is unaffectedly employed as a *mean* for discovering or ascertaining the specific and doubtful intention. In the former case the reason or principle of the statute is itself erected into a law, and is applied to a *species* or case which the lawgiver has manifestly overlooked. The *bastard* extensive interpretation *ex ratione legis*, is not unfrequently styled *equity*. Or a law is said to be *interpreted* agreeably to the demands of *equity*, when its provisions are extended to an omitted case, because that omitted case falls within its reason.

Now in this application of the term '*Æquitas*,' the radical idea is '*uniformity*' or '*universality*.' The law (it is supposed) should be applied *uniformly* to *all* the cases which come within its principle. For the law (it is assumed) would have embraced *all* such cases, if the legislator had adverted completely to the

'Essay on Codification,' for which some materials exist. It seems probable that an incomplete 'Excursus on Analogy' and a short 'Essay on Interpretation' (which is perfect) had the same destination.—S. A.

consequences which its principle implies. 'Quod in re pari valet, valeat in hac quæ par est. Valeat æquitas : quæ paribus in causis paria jura desiderat.' For the same reason, this bastard extensive interpretation *ex ratione legis* is frequently styled 'analogical.'

The cases which the law omits (but which fall within its principle) and the cases which fall within its principle, and which it actually includes, are *analogous*. Or (changing the expression) they are resembling cases, *with reference to that common principle*, in spite of the differences by which they are distinguished when viewed from other aspects. And, since they are resembling cases with reference to the principle of the law, *analogy* (as well as *equity*) is said to require, that the law should be applied to *all* of them in an equable or uniform manner. Equity and Analogy (as thus understood) are exactly equivalent expressions. 'Æquitas (say the lawyers) paribus in causis paria jura desiderat.' 'Analogia (say the Grammarians) est similitum similis declinatio.'

In that bastard interpretation *ex ratione legis*, which is styled *extensive*, the law is applied to a case which it clearly omits, because the omitted case falls within its principle. In that spurious interpretation *ex ratione legis*, which is styled *restrictive*, the law is *not* applied to a case which it certainly includes, because the case, which is included by its actual provisions, is not embraced by the general design of the lawgiver.

By Grotius, the term '*æquitas*' has also been applied to this last-mentioned species of pretended interpretation or construction. Or, according to Grotius, a law is also interpreted agreeably to the demands of *Equity*, when it is *not* applied to a case which it actually includes, but which (looking at its purpose) its provisions should not embrace. Now the term Equity as thus applied, hardly imports *uniformity* or *universality*. But still it imports the *consistency* which is implied in uniformity, and which is the ground of the so-called extensive interpretation *ex ratione legis*.

By the so-called extensive interpretation *ex ratione legis*, the provisions of the law are *extended* agreeably to its principle. Why? Because it is presumed that its maker must have wished to be consistent with himself. And, for precisely the same reason, the provisions of the law are *restricted*, agreeably to its principle, where its provisions and principle positively conflict. In either case, it is presumed that the author of the law must have wished to be consistent with himself; and the

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defect or incoherency of his specific and proximate intention is accordingly supplied or corrected from his general and remote design. But the term 'equity,' as applied to *restrictive* interpretation, certainly deflects considerably from its primary meaning. It scarcely imports uniformity; although it imports the consistency (—the harmony or *elegantia*) which uniformity necessarily implies.

By the ancient writers, 'æquitas' (I believe) is never applied to *restrictive* interpretation. The '*æquitas*' of Cicero and the Classical Jurists (when they mean by *æquitas*, interpretation or construction) is the so-called *extensive* interpretation *ex ratione legis* of modern writers upon Jurisprudence; the '*æquitas*, quæ *paribus* in causis *paria* jura desiderat.'

It may indeed be doubted (as I shall shew in the proper place), whether the so-called interpretation, which *restricts* the operation of statutes, was permitted by the Roman Law, or ought to be permitted by any.

It may seem, at first sight, that the pretended interpretation which extends, and the pretended interpretation which restricts are nearly alike. For, in either case, the specific intentions, which the provisions of the law evince, are amended by the general design which predominated in the mind of its author.

But (as I shall endeavour to shew in the proper place) the consequences of the former and the consequences of the latter are widely different. Defects in the provisions of a law may be supplied from its manifest reason, with little or no inconvenience. But if judges might abrogate laws, wholly or in part, whenever their actual provisions were not consistent with their grounds, all statute laws would become uncertain, and the cases which they include would be abandoned to the *arbitrium* of the tribunals: 'Cessante ratione legis cessat lex ipsa,' is a maxim which sounds well, but which tends directly to tyranny.

Equity as
meaning
judicial
impartial-
ity.

Secondly :) Equity often signifies *judicial impartiality*: That virtue which is practised by judges, when they administer the law, agreeably to its spirit or purport, uninfluenced by extrinsic considerations.

In this sense, Equity has been defined by many jurists, 'The application of Statute Law to the given case, agreeably to the specific intention or the general design of the legislator.' To abide by the grammatical sense of the legislator's words, as evidenced by clear marks, is to administer '*summum jus*,' and if such administration be *callida* rather than *asinina*, if it proceed from a mischievous intent rather than from sincere error, the

judge who so administers the law is guilty of '*summa injuria*.' '*Æquitas nihil est* (says a celebrated modern jurist) *quam benigna et humana juris scripti interpretatio, non ex verbis, sed à mente legislatoris facta.*' '*Benignius* (say the Pandects) *leges interpretandæ sunt, quo voluntas earum conservetur.*' In which definition and precept, 'Equity' and 'Benignity' would seem to be merely synonymous with 'sincerity' and 'impartiality.' The judge is admonished to apply the law agreeably to the specific intention or general design of the legislator.

Thirdly :) Taken in the significations which I have now considered, Equity means something determinate and precise. But, frequently, it signifies nothing more than the arbitrary pleasure of the judge, disguised with a name which imports praise, and which therefore is spacious and captivating. Equity, as defined by Cicero and others, is nothing more than the mere *arbitrium* of the judge, or is nothing more than the *arbitrium* of the judge as determined by narrow considerations of particular good and evil.

According to some, it is the office of Equity (meaning the Equity of Judges as exercising their judicial functions) to correct the particular evils which flow from the generality of the Law. '*Æquitas* (says Cicero in precisely the same spirit) *est laxamentum juris.*' And here I may remark, that if the general rule be good in the main, the equity which affects to correct its particular evil consequences is clearly mischievous. It is hardly possible to imagine a case, wherein the application of a general rule is not productive of some consequence which a good-natured judge would wish to avert. So that if it were competent to the judge to apply or dispense with rules, agreeably to his notions of particular consequences, there would be no law to which expectations could be accommodated, and by which conduct could be guided.

Where Rules are bad (and the Legislature is incapable or supine) it is indeed expedient (as I shall shew in a future Lecture) that the judge should do the business of the supine or incapable legislature, and abrogate or amend the pernicious or defective law. But to abrogate or amend a law directly or indirectly, is widely different from the Equity which allows the law to remain, and simply dispenses with it in specific cases. By abolishing or amending the law once for all, partial evil may be inflicted. But the bad law is itself removed, and a good rule of conduct is substituted in its stead. The Equity which dispenses with the law in particular instances, leaves

Equity as
meaning
arbitrium.

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the standing nuisance untouched, and renders all Law utterly uncertain.

The evils of the Equity which I have now described are not badly put in the following passage: which I take from a tractate, or dissertation, by a certain *laudatus* but somewhat obscure writer, 'pro summo jure contra æquitatis defensores.'

'Non sunt illæ injuriæ, quas subtilitatis studium et observatio juris introduxit, tam lamentabiles quam illi dolores quos parit æquitas. Est longe melius unum quandoque aut alterum lædi, quam fortunas hominum à solâ æquitate et arbitrio judicis, seu, ut rectius dicam, à fato dependere. Quis volubilem adeo et incertam æquitatem ut juris justitiæque normam agnoscat? Admissâ hac justî normâ merito conqueri possumus, leges habere cereum nasum, et quamcunque in partem inflecti posse.'

Equity, as meaning standard, legislative (or other ethical) principles.

Fourthly :) I remarked in a former Lecture that the *jus naturale* or *gentium* of the classical jurists and the Law Natural of modern writers on jurisprudence, often mean nothing more than that standard to which, in the opinion of the speaker, law should conform.

The same may be said of *æquitas*, or *naturalis æquitas*.

In this sense it is said that equity is the spirit of laws: or (as the French have it) 'L'équité est l'esprit de nos lois.' In this sense of the term, writers often talk of an *Æquitas legislatória*, by which, if they mean anything distinct, they must mean general utility. In this sense, *Æquitas* is reckoned by Cicero amongst the sources of Law; which is obviously absurd, though *æquitas*, in the sense here used, may be one of the inducements which lead to the enactment of a law. He enumerates the following as the sources of the Roman law: *Leges*, *Senatus-consulta*, *res judicatæ* (by this he means law established by specific decisions), *juris-peritorum auctoritas edicta magistratuum*, *mos* or customary law, and lastly a certain *æquitas*; by which it is manifest that he cannot mean anything more than what I have just expressed. In the same vague sense as meaning utility, or any standard whatever, innovating judges (whether Prætors, Chancellors, or Chief Justices) have generally applied the term 'equity' or 'equitable' to the new rules which they have ventured to introduce.

Equity, as meaning performance of imperfect obligations.

Fifthly) and lastly, Equity is often synonymous with the performance of imperfect obligations.⁴⁷ An equitable or just man is a man who, though not compelled by the legal sanction, performs the obligations imposed by the moral and religious

⁴⁷ Mühlenbruch, vol. i. p. 76.

sanctions. In like manner equity is often used as synonymous with morality.⁴⁸ Whether with positive morality, or with morality as it ought to be, is generally left undetermined; for the notions of the ancients seem to have been perfectly vague as to the bounds which separate laws from morality, or positive law and positive morality from the principles of legislation and deontology. *Æquitas* is often spoken of as synonymous with *honestas*. *Jus gentium* and *naturale* often have the same meaning. They denote morality, I believe positive morality, as distinguished from positive law.

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As meaning Morality.

NOTES.

The term 'equity,' as meaning a portion of positive law, seems to be equivalent to *impartiality* or *equality*:

E.g. Older *Jus gentium*.

Again: *Jus prætorium*, either as having borrowed largely from that *jus gentium*, or as being itself of a more equal and impartial character than the *jus civile*: e.g. Giving rights to strangers, persons in *poteestate*, etc.

Origin of application of term to Equity as meaning Law.

Again: Expected of Prætors and other legislating magistrates, that their law should be *æquum, et non ambizioso factum*. Thence, applied to any law which any one wished to commend; especially by innovating judges seeking to commend to others their innovations.

Equity,—not the name of *jus prætorium*, but the law itself—said to arise from the suggestions of the personified abstraction styled 'equity.'

Seems, in England, to be the name of the law. The law would be called better, 'Chancery Law.' Circumlocutions for Equity Law.

LECTURE XXXIV.

EQUITY AS A DEPARTMENT OF LAW CONSIDERED HISTORICALLY.

JURISDICTION OF THE PRÆTOR URBANUS.

HAVING examined certain meanings of the term 'Equity' as *not* denoting Law (or a portion of some body of law), I proceed to those portions of certain bodies of law which are distinguished by the name of 'equity,' or by the epithet of 'equitable;' or which are said to owe their creation to the suggestions of 'equity;' or which are said to be remarkable for their 'equitable' spirit; or which are said to rest exclusively, or in the main, upon 'equitable' grounds or principles.

Of all those portions or departments of bodies or systems

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Various equivalent circumlocutions for 'Equity' as meaning positive Law, or a portion or department of a

⁴⁸ 'Velut erga Deum religio: ut parentibus et patriæ pareamus.' D. i. 1, 2.

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system of
positive
Law.

Equity of
Prætors
called *jus*
prætor-
ium ;
æquitas
not being
the Law
which he
makes, but
the (per-
sonified)
principle
of legisla-
tion (util-
ity or
other)
which
determines
him to
make it.
English
Equity
ought to
be called,
rather,
Chancery
Law.

Taking
equity as
not mean-
ing law,
Courts of
Equity
and Courts
of Law are
equally
concerned
with it, or
equally
strangers
to it.

Equity as
a depart-
ment of
law : an
historical
and partic-
ular no-
tion.

of Law, which have gotten the name of 'Equity,' or the epithet of 'equitable,' the most remarkable and interesting are the following : namely, that portion or department of the Roman Law, which was introduced by the perpetual Edicts of the *Prætores Urbani* ; and that portion or department of the Law of England which is exclusively⁴⁹ administered by tribunals styled 'Courts of Equity,' and was introduced by judicial decisions of the English Chancellors as exercising their extraordinary jurisdiction.

That portion of the Roman Law which was introduced by the perpetual edicts of the *Prætores Urbani*, is commonly styled *Jus prætorium*. That portion of the Law of England which is exclusively administered by Courts styled 'of Equity,' I would call '*Chancery Law*.' For, though it is not administered by the Court of Chancery only, it was introduced, and (in the main) has been formed, by judicial decisions of that high tribunal.

The application of the term 'Equity' to that portion of our Law, and of the phrase 'Courts of Equity' to the tribunals by which it is administered, is grossly improper, and leads to gross misconceptions. Taking the term 'Equity' as meaning a species of interpretation ; or as meaning the impartiality which is incumbent on judges and arbiters ; or as meaning judicial decision not determined by rules ; or as meaning good principles of direct or judicial legislation ; or as meaning the cheerful performance of imperfect duties ; or as meaning positive morality, or good principles of deontology, the Courts styled 'of Equity' and the Courts styled 'of Law' are equally concerned with Equity, or are equally strangers to Equity.

Having premised these remarks, together with the prefatory explanations contained in my last Lecture, I shall endeavour to compare or contrast Prætorian and Chancery Law as perspicuously and as correctly as the brevity to which I am constrained will permit.

This comparison or contrast will subserve a double purpose.

First : It will shew that the distinction between Law and Equity (meaning by equity a portion or department of law) is not deducible from the universal principles of jurisprudence, but is accidental and anomalous : that in every system of law, in which the distinction obtains, the import of the distinction is singular or peculiar, or (changing the expression) that the distinction between Law and Equity, which obtains in *one* system, resembles in name, rather than in substance, the distinction between Law and Equity which obtains in *another*.

⁴⁹ See note, p. 601, *post*.—R. C.

Secondly : By previously comparing or contrasting Prætorian and Chancery Law, I shall be able to state and examine, with more clearness and effect, the distinctive properties of direct and judicial legislation : the respective advantages and disadvantages of the two species ; with the much agitated and interesting question, which regards the expediency of reducing bodies of Law into formal systems or Codes.

But in order that I may institute this projected comparison or contrast, and may make it subserve the purposes at which I have now pointed, I must state the nature of the *jurisdiction* exercised by the *Prætores Urbani* ; and also the nature and causes of the *direct legislative power*, which they first exercised with the tacit, and then with the express, authority of the sovereign Roman People.

The history and nature of the jurisdiction exercised by the Court of Chancery is, I may confidently assume, well understood by my hearers. To *that*, therefore, as to something sufficiently known, I shall merely allude.

Liberâ republicâ, or before the virtual dissolution of the free or popular government, criminal cases were regularly tried and determined by the assembled Roman People : Though, by virtue of particular and exceptional laws, the particular criminal cases, to which those laws related, were tried and determined by bodies of *judices*, or jurymen, to which, as to committees of its own number or body, the sovereign people delegated its judicial powers.

Criminal Jurisdiction *liberâ, republicâ*, with distinction of wrongs into *public* and *private*.

Hence it is, that the parts of the Institutes and Pandects which relate to criminal procedure, bear the title '*De judiciis publicis*.' And hence it is, that '*crimen*' is often styled in the language of the Roman Law '*delictum publicum*.' Since the regular or ordinary tribunal was the people, community, or *public*, the trial and judgment were naturally styled '*public*;' and the epithet naturally applied to the trial and judgment, was as naturally extended to the delict or offence itself.

After the popular government had been virtually dissolved, and the trial of criminal cases gradually withdrawn from the people, criminal procedure and crimes still kept the names of '*judicia et delicta publica*.' Although the epithet '*public*' (in its primary import) was now no more applicable to criminal procedure or crimes than to civil procedure or the delicts styled '*private*.'

And since crimes and criminal procedure kept the epithet

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of 'public,' although (in its primary import) it had ceased to apply with propriety, the Classical Jurists justified or accounted for the epithet in the following manner: They supposed that crimes affect the *public* or *community*; whilst the mischief of private delicts, and of other civil injuries, is limited to the injured individuals. That it is, therefore, the interest of the public to pursue or prevent crimes; whilst the pursuit or prevention of private delicts, and of other civil injuries, may be left to the discretion of the individuals who feel or who are obnoxious to the damage.

Civil Jurisdiction of Prætores Urbani.

In the earlier ages of the Roman Republic, civil jurisdiction (or jurisdiction properly so called) was exercised by the Consuls. But as the Consuls were commonly busied with military command, a magistracy styled '*Prætura*' was afterwards created; and to the magistrate by whom this office was filled, the civil jurisdiction originally exercised by the Consuls was completely transferred.

When I say that civil jurisdiction was originally exercised by the Consuls, and afterwards by the Prætors (as representatives or substitutes of the Consuls), I understand the proposition with certain limitations. For, in certain excepted cases, civil jurisdiction was exercised by magistrates styled *Centumviri*; by the *Ædiles* (or the conservators of public buildings, roads and markets); and also by the *Pontifices* (or priests). But in respect of my present purpose, these exceptions are immaterial, and may therefore be dismissed with this brief and passing notice.

The tribunal of the original Prætor (or of the Prætor who was appointed as the representative or substitute of the Consuls) was fixed immovably in the City of Rome: And (owing to the cause which I explained in a former Lecture) his jurisdiction was originally restricted to civil cases arising between Roman Citizens. Consequently, after the subsequent appointment of the *Prætor Peregrinus*, and of Presidents or Governors (sometimes styled '*Prætors*') to the outlying provinces, he was styled, by way of distinction, *Prætor Urbanus*. When that distinctive epithet was not needed, he was styled *Prætor* simply.

Order of procedure before the Prætor as exercising his judicial function.

The judicial functions of the Prætor bore less resemblance to the functions of our own Court of Chancery, than to those of our own Court of Common Pleas, or of our other Common Law Courts (regarded as civil Tribunals).

For, in causes falling within his jurisdiction, the ordinary or regular procedure was this:—

The *Prætor alone* disposed of the cause, or the *Prætor alone* heard and determined, in the following events:

First, If the defendant confessed the *facts* contained in the plaintiff's case, without disputing their sufficiency *in law* to sustain the demand:

Secondly, If the contending parties were agreed as to the *facts*, but came to an issue of *law*:

Thirdly, If the defendant disputed the truth of the plaintiff's statement, but the statement was supported by evidence so short, clear, and convincing, that the *Prætor* could decide the issue of fact without an elaborate and nice inquiry.

But if the parties came to an issue involving a question of fact, and the evidence produced to the *Prætor* appeared doubtful, the *Prætor* defined or made up the issue, or put the disputed point into a *formula* or statement.

The *formula* (or statement of the issue) being prepared by the *Prætor*, the issue was submitted to the decision of a *Judex* or *Arbiter*: Who (it seems) was appointed for the particular or specific occasion; and is rather to be regarded as a *juryman* (taken *pro re nata* from the citizens at large) than as a permanent judicial officer.

The *judex* or *arbiter* thus appointed, not only inquired into the question of fact, but gave judgment generally upon the issue submitted to his decision.

The *formula* (or statement of the issue), together with the judgment of the *judex* or *arbiter*, was remitted to the *Prætor* (or to the Court above).

The judgment of the *judex* or *arbiter*, was then carried into *execution* by or by the command of the *Prætor*: By whom (in every cause) the consummation, as well as the initiative of the procedure, was superintended or directed.

It may here be observed that *jurisdictio* was properly the power of hearing and determining causes, or of associating a *judex* or *arbiter* when necessary. This was all that the word meant, and the *Prætor* had this power by virtue of his *jurisdictio*. *Jurisdictio* was distinct from the *coercitio* (or power of compelling and restraining) which might be necessary to carry into effect the judgment of the *Prætor* or *judex*.

Jurisdictio,
what.
Coercitio.
Imperium
merum:
mixtum.

The power of compelling or restraining (when vested in criminal tribunals) was called *imperium*, or *imperium merum*; and is often synonymous with our 'criminal jurisdiction.' 'Jurisdiction' (in Roman law-language) is seldom or never applied to

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criminal jurisdiction. When combined with civil jurisdiction, the power of coercing was styled *imperium mixtum*.

Imperium merum, as well as *mixtum*, resided in the Presidents or Governors of Provinces.

The Prætors, whose jurisdiction was merely civil, had *imperium only*.

The *Præfectus urbi* (under the emperors) *imperium merum only*.

Order of
procedure
before the
Prætor,
etc.

From this division of judicial power between the *prætor* and the *judex*, the functions of the prætor more resembled those of the Courts of Common Law, than those of the Court of Chancery.

The important differences between the functions of the prætor and those of our Common Law Courts were the following:

First, the *formula* empowered the *judex* not simply to find for one party or for the other, but to add to the finding what should be done by the parties in pursuance of the finding; not only to give a verdict but to give judgment; the verdict being involved in the terms of the judgment which he gave. This was then remitted to the court above, and by them merely executed. With us the jury merely finds for one party or the other: what shall be done in pursuance of the finding, is determined by the court above.

Secondly, another very important difference is this. With us, where the parties come to an issue of fact, the cause goes to the jury at all events; but in the Roman law, the cause was not necessarily referred to a *judex* because the issue was an issue of fact. It was at the discretion of the prætor either to give a *judex* or not. When he did so he acted more like the chancellor when he directs an issue. The cases would be exactly alike, if the chancellor granted an issue whenever the question of fact could not be properly tried in the court above. There was the same difficulty in settling the bounds between the power of the prætor and that of the *judex*, as with us between the judge and the jury, where the boundary is perfectly indefinite. It is often said indeed that the court judges of the law, the jury only of the fact: but it is only necessary to look at the terms of the finding, to see that this maxim is false. Generally, and notoriously, the jury is judge of law as well as of fact. In the Roman law there was the same difficulty; for though the issues were made up with great preciseness, they often involved questions of law: and the judgment often directed the prætor to come to a certain conclusion if certain premises were established: which involved a proposition of law as well as of fact. *Si paret Aulum Egerium*

apud Numerium Egerium argentum deposuisse idque die nominato Numerius Egerius Aulo Egerio non reddiderit . . . condemnato.

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I may remark also that the proceedings before the prætor were called proceedings *in jure*; those before the *judex* or *arbiter* to whom he remitted any part of the case, proceedings *in judicio*.

*Jus et
judicium.*

I shall also observe, that the original proceedings before the prætor approached more closely than any other proceedings which I know to what Mr. Bentham calls *natural procedure*; for the whole pleading or process by which the precise point at issue is elicited, took place *vivâ voce* in the presence of the prætor himself. The witnesses were present and the prætor himself decided the cause immediately and on the spot, if the question of fact was not attended with difficulty. Nothing could be more summary or less dilatory and expensive.

Natural
procedure.
After-
wards
altered.

After the judicial constitution was changed, the distinction between the prætor and the *judex* was abolished, and the whole proceeding took place before a single judge. A similar alteration took place about the same period in the manner of conducting the pleading. The parties began to put in their mutual allegations in writing, in the modern form: which has introduced the delay and expense of the administration of justice in modern times.

In certain cases, the prætor at the outset gave provisional or conditional judgments, or issued provisional commands on an *ex parte* statement by the Plaintiff: a process like an injunction in Chancery or a *mandamus* in the Courts of Common Law. The command being issued provisionally by the prætors, the parties to whom it was addressed were compelled to obey it if they considered that they had not a case; if they considered that they had, they might shew cause why they should not obey the command provisionally issued. If the party in possession disputed the command and shewed cause against it, and there appeared doubt as to a question of fact, this question was treated in the regular manner and remitted to a *judex*.

Procedure
on an
Interdict.
See next
Lecture.

What I have now described was the regular and ordinary proceeding. In certain cases, which it is not necessary to detail, the prætor was said to have not only *jurisdictio* but *cognitio*. He might enquire into a question of fact, whatever might be its difficulties, and dispose of the whole case without a *judex* or *arbiter*. The prætor, too, like some modern courts of justice, exercised a voluntary jurisdiction in cases relating to contracts. The proceedings in such cases are not suits at all: though it is within the province of courts of justice to give judicial authority

Cognitio,
or proceed-
ing *extra
ordinem*.

LECT.
XXXIV

to the convention and to facilitate the production of evidence if any difficulty arise. In the old Roman law, the prætor exercised this jurisdiction *de plano*, not *pro tribunali*. As the cause was not a suit *inter partes*, but merely a convention or contract, it was not conducted with the forms of judicature. The prætor lent his auspices, not as a judge, but as sanctioning the proceeding. Fines and recoveries in the Common Pleas⁵⁰ are very similar to this jurisdiction of the Prætors; and what was called *in jure cessio*⁵¹ is exactly analogous to fine and recovery. This was a mere conveyance, in the form of a fictitious suit, carried on in the presence of the prætor, with nearly all the formalities which accompanied a real suit.

Ulti-
mately cog-
nitio, or
proceeding
*extra ordi-
nem*, uni-
versal.

The jurisdiction which I have attempted to describe, and the division of the judicial powers in certain cases between the court above and an occasional temporary tribunal, seems to have been altered about the end of the third century. It was in force in the time of Gaius: but in the time of Justinian the old judicial establishments had been completely altered. It is for that reason asserted in the Institutes *hodie omnia judicia sunt extra ordinem*. The cognisance of the suit from its institution to its completion was then wholly had by a single judge, and the original practice, which seems to have been generally adopted, of dividing the judicial power in the manner above mentioned, was dropped.

The only *close* resemblance between Roman and English Equity appears to be this: that under each system the law corrected or abrogated by the so-called equity law is allowed to exist in form.

Another resemblance: that Roman and English Equity has been formed to some extent by analogy on the law to which it is contrasted: the one by analogy to *jus civile* (*subsequitur jus civile*); the other, to Common Law (*sequitur legem*). Of course they must have deviated; but analogy was observed to some considerable extent. This, however, is not a proof of resemblance, since much of every body of innovating law is formed by the same analogy.

⁵⁰ An instance of modern procedure bearing probably a still closer analogy to the interposition of judicial authority mentioned in the text, is furnished by bonds and contracts bearing a clause of registration for execution, according to the Scotch practice.—R. C.

⁵¹ Gaii Comm. ii. § 22.

Res mancipi were alienable by Mancipation (a fictitious sale); *in jure cessio* (a fictitious suit); or (if corporeal) by usucapion working upon simple tradition. —Marginal note in Gaius.

LECTURE XXXV.

LEGISLATION OF THE PRÆTORS.

FROM the judicial functions of the *Prætores Urbani*, I proceed to that power of direct legislation which they exercised (at first) with the tacit consent, and (afterwards) with the express authority of the sovereign Roman People.

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Originally and properly, the Prætor was merely a judge. It was his business to *administer* the Law, established by the Supreme Legislature, in specific cases falling within his jurisdiction.

The direct legislative power of the Prætors was originally confined to *Procedure*, but afterwards extended to *Substantive Law*.

But though it was his business to *administer* the law established by the supreme legislature, the manner of administration, or the mode of procedure, was left, in a great measure, to his own discretion. Accordingly, every Prætor, on his accession to the Prætorship, made and published *Rules of Procedure or Practice*: Rules to be observed, during his continuance in office, by those who might happen to be concerned (as parties, or otherwise) in causes coming before him.

Such, originally, was the direct legislative power exercised by the Prætors. It extended to procedure or practice, but not to the substantive law which it was their business to administer. It may be likened to the power of making *Regulæ Praxis* which is not unfrequently exercised by our own Courts of Justice.

But, in consequence of incessant changes in the circumstances and opinions of the Roman community, corresponding changes in its institutions were absolutely necessary. And, inasmuch as the demand for innovation was slowly and imperfectly supplied by the supreme and regular legislature, the Prætors ventured to extend their direct legislative power, and to amend or alter the substantive law which properly it was their office to administer.

As I have used the expression substantive law, I may here note that this name is applied by Mr. Bentham to the law which the Courts are established to administer, as opposed to the rules according to which the substantive law is itself administered. These last, or the rules of procedure or practice, he has termed adjective law. These expressions appear at first sight somewhat odd; but they are closely analogous to the terms employed to denote the same two departments of law, in a very able report presented to the Prussian Government in 1811. What Mr.

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Bentham calls substantive law, the framer of the report calls material law; the adjective law of Mr. Bentham he calls formal law. The only difference is that the one writer draws his metaphor from the language of grammarians, the other from that of logicians. The expressions of the French law are nearly similar. Substantive law, or the law which the Courts are appointed to administer, is called by the French lawyers *le fonds du droit*: adjective law, or the rules according to which the substantive law is to be administered, they call *la forme*. There is really nothing odd or eccentric in Mr. Bentham's phrases. There are indeed many objections to them, and I think that it would be better to express the meaning by a circumlocution; because there are many rules which are not properly rules of procedure, but which might with equal propriety be called adjective law, or formal law; such as the formalities prescribed by law in entering into contracts.

I adopt, for the present, the distinction between substantive and adjective law, although, as I shall shew hereafter, it cannot be made the basis of a just division.

Difference
between
general
and special
Edicts.

The Law introduced by the Prætor (whether it consisted of *substantive* law, or of rules of procedure or practice) was introduced (for the most part) by their *general* Edicts, or by their Edicts (simply so called).

The Edicts, Orders, or Precepts, issued by the Prætors, were of two kinds: general and special.

A general Edict was made and published by a Prætor in his legislative capacity. A *special* Edict was made and issued by a Prætor in the exercise of his judicial functions.

A general edict consisted of a rule or rules, which had no specific relation to a specific case or cases, but regarded indifferently all cases of a given class or classes. A special edict was issued in a specific cause; was addressed to a person or persons concerned in that cause, and specifically regarded the person or persons to whom it was addressed.

In short, a general edict was a statute, or a body of statute law; and was made and published by its author *as a subordinate legislator*. A special edict was an order, made in a specific cause; and was made and issued by its author *as a judge*.

It appears, then, that the term 'Edict' was often applied indifferently, to the general rules or orders which were published by the Prætors as legislators, and to the special orders or commands which they made and issued as judges. But when the Edicts of the Prætors are mentioned without qualification, their

general or legislative edicts, and not their particular or judicial, are commonly or always referred to by the writer.

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In like manner, the *jus edicendi*, which is ascribed to the Prætors, denotes their power or right of making general rules, and not their power or right of making special orders in the exercise of their judicial functions. And so, '*edicere*,' or '*jus edicere*' is to legislate *directly*: The act of *judging* (or of applying existing law in specific causes) being denoted by the expression '*jus dicere*' (or '*jus decernere*').

In the orations of Cicero against Verres, '*edicere*' and '*decernere*' are directly and distinctly opposed in the senses which I have now referred to. For one of the charges against Verres (who as Governor or President of a province was invested with the *jus edicendi*) is this: quod aliter, atque ut *edixerat*, *decrevisset*:—that in the decrees or orders, which he issued as judge, he violated the rules, which he had established in his legislative capacity, by his own general edict. In like manner, the *general* constitutions promulged by the Emperors as legislators (when opposed to the decrees which they issued as judges in the last resort) are frequently styled '*edictal*.'

Interdicere (as well as *dicere* and *decernere*) is also opposed to *edicere*. But an *interdictum* was a special and judicial order of a particular species. It was a provisional or conditional order made by the Prætor on the *ex parte* statement of the applicant: The party to whom it was addressed having the power of shewing cause why the order should not be carried into effect. In short, it was what would be styled, in the language of our own law, an *injunction* or *mandamus*.

Any Prætor might publish a general edict at *any* period during his stay in office. But, generally speaking, all the rules or laws, which were published by any given Prætor, were published or promulged *immediately after his accession*, and were comprised in *one* edict, or constituted one edict.

Why the
general
Edicts of
the Præ-
tores were
styled
perpetual.

The edict which was published by any given Prætor, was not legally binding upon his successor in the Prætorship, and only obtained as Law till the end of the year during which he himself continued in office. And, accordingly, the general edicts of the Prætors, or their edicts simply so called, are styled by Cicero and others '*Edicta annua*,' or '*leges annuæ*.'

But though a general edict was merely *annual* (or merely obtained as Law while its author continued in office), the general or legislative Edicts, made and promulged by the Prætors, are nevertheless styled '*perpetual*.' Now the epithet '*perpetual*'

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(taken in its ordinary meaning) is hardly applicable to a law or statute of a certain or definite duration. A *perpetual* law or statute (taking the terms in their ordinary meaning) would seem to denote a law which was intended to be irrevocable, or which (at least) was intended to endure until some competent authority should abrogate or repeal it.

Accordingly, the epithet 'perpetual' (when applied to the legislative edicts made and published by the Prætor) indicates their generality, and not their duration. When thus applied, the epithet '*perpetual*' is opposed to '*occasional*,' and is used to distinguish the *general* edicts of the Prætors from the *special* edicts or orders which they issued in their judicial capacity.

And (taking the epithet 'perpetual' in this meaning) it was justly applicable to these general or legislative edicts, although their duration was definite or certain. For a special or judicial edict was issued in a given cause: was restricted to the cause in which it was issued; and *expired* with the specific exigency which it was intended to meet. It was an occasional order concerning a particular case, and not extending generally to cases of a class. In the language of the Roman Law, it was made and issued '*pro re natâ*' (or '*prout res incidit*').

But an edict issued by a Prætor, as exercising his legislative powers, consisted of general Rules. It was neither provoked by a *specific* occasion, nor did it expire with any of the specific occasions on which its general provisions were actually applied. It was intended to apply to entire classes of cases; and was applicable to every case belonging to any of those classes, so long as the Prætor by whom it was promulged should occupy his office. In the language of the Roman Law, it was made and issued, '*non prout res incidit, sed jurisdictionis perpetuæ, causâ*.' It was not provoked by a specific incident or occasion; but was intended to serve as a guide to all who might be concerned in causes, so long as the Prætor who issued or promulged it should continue to exercise the jurisdiction annexed to his office.

The epithet '*perpetual*' when applied to the Edict of a Prætor, is therefore synonymous with '*general*' (as opposed to '*specific*' or '*occasional*'). It denotes that the Edict consisted of general provisions; and not that it was calculated to endure *in perpetuum*, or until it should be abrogated or repealed by a supreme or subordinate legislature. As opposed to general and legislative edicts, special and judicial edicts are frequently styled *repentina*: An epithet which does not denote that they were

issued in haste, but that they were made on the spur of a specific or particular occasion.

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The Prætorian Edict, which was in force at any given period, was properly the edict of the Prætor who then occupied the Prætorship. For the edict which was promulged by any given Prætor, expired with the year during which he stayed in the office, and yielded to a similar edict promulged by his immediate successor.

*Edictum
tralatitium, or
the Edict
of the
Prætor or
Prætors.*

But though the edict of every foregoing Prætor was superseded by the edict of his immediate successor in the office, every succeeding Prætor inserted in his own edict, all such rules and provisions, contained in the edict of his predecessor, as had found favour with the public at large, or had met with the approbation of the classes who influenced the community. For, as the legislative power of the Prætors was derived from the tacit consent of the sovereign people, its exercise was inevitably determined by general opinion.

Such being the case, the edict promulged by every succeeding Prætor was a simple or modified copy of the edict promulged by his predecessor. He simply *republished* the edict which his immediate predecessor had issued, or else he republished it with such omissions and additions as were demanded by general opinion or suggested by general expediency. If he simply copied the edict which the foregoing Prætor had promulged, the edict promulged by himself was simply *translatitious*, or *tralatitious*. in other words, it merely consisted of rules and provisions, which he translated (transferred or adopted) from the edict of his immediate predecessor.

If he copied the edict of his predecessor with certain modifications, the edict promulged by himself was partly *Edictum tralatitium*, and partly *Edictum novum*. So far as it consisted of provisions taken from the edict of his predecessor, it was *Edictum tralatitium*. So far as it consisted of provisions devised and introduced by himself, it was not *Edictum tralatitium*, but *Edictum novum*.

It rarely happened that the general edict of a Prætor was purely *tralatitious*. For incessant changes in the position and opinions of the community created an incessant demand for corresponding changes in its law. And since this continued demand was slowly and imperfectly satisfied by the supreme and ordinary legislature, the Prætors were provoked to supply the demand by a continued though cautious exercise of their legislative powers.

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It is remarkable that all the edicts of all the successive Prætors are frequently considered as constituting *one* Edict. They are frequently styled (in the singular number) '*the* Edict;' '*the* Prætorian Edict;' or '*the* Edict of the Prætors or Prætor.' The process of translation or transference which I have attempted to describe, explains this form of expression.

With reference to its *promulgation*, the general Edict, which was in force at any given period, was the edict of the Prætor who then occupied the Prætorship. But with reference to its *contents*, or to the rules of which it consisted, it was partly the production of the Prætor who then occupied the Prætorship, and partly the production of his various predecessors in the office. For much of the edict promulgated by every Prætor, was translated into the edict promulgated by his immediate follower. With reference, therefore, to their contents (though not with reference to their promulgation), the series of edicts, issued by a series of Prætors, constituted an indivisible whole, or formed a continuous chain. Although the edict for the time being had been promulgated by the actual Prætor, his predecessors as well as himself, had lent a hand to the formation of its provisions.

And here I may remark, that, after the Prætors had legislated through a long tract of time, the general Edict of the Prætor for the time being naturally consisted (for the most part) of derivative or translatitious rules. For as the legislative power of the Prætor was commonly exercised discreetly, the rules, introduced originally by the Prætor, for the time being, were comparatively few and unimportant. They bore a small and insignificant proportion to those provisions of his predecessors which were also a part of his edict, and which had accumulated through a series of ages.

The '*jus prætorium*' was formed by the *Edicts* of the Prætors.

The aggregate of rules, which had been introduced by successive edicts, and which were embodied in the edict obtaining for the time being, formed or constituted, at any given period, the portion of the Roman Law which was styled '*Jus Prætorium*.'

A part of the Roman Law (like much of the Law of England) was made by judicial decisions on specific or particular cases. Decided cases, serving as *precedents*, formed a portion of the Roman, as well as of our own system. In the language of the Roman Law, as well as in the language of the English, such decided cases are frequently called precedents:—'*præjudicia*.' More commonly, however, such decided cases are styled '*res judicatæ*.' And their influence (as precedents) upon *subsequent*

judicial decisions, is styled '*auctoritas rerum perpetuo similiter judicatarum.*'

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Now as most civil cases fell within the jurisdiction of the Prætor, most of the civil law, which was formed by judicial decisions, *might* have been styled with propriety '*prætorian law.*' Where the Prætor decided without an *arbiter* or *judex*, the questions of law which happened to arise in the cause were of course determined by himself. And where he remitted the cause to a *judex* or *arbiter*, the questions of law, which the *formula* happened to involve, were probably decided in effect by the Court above, and not by the secondary or subordinate tribunal. The *judex* probably took the opinion of the Court above on the point of law, and decided accordingly. I have not been able to discover, whether it was *incumbent* on the *judex* to take the Law from the Prætor, and whether the latter could grant a new trial in case the *judex* or *arbiter* decided against the law, but it is probable that, in practice, such a miscarriage in *judicio* seldom occurred.

But though most of the law, formed by judicial decisions, was made by the Prætors (as judges), and *might* have been styled '*prætorian,*' the term '*jus prætorium*' was exclusively applied to the law which they made by their general edicts in the way of direct legislation.

This is a fact which I cannot account for satisfactorily ; but which (perhaps) may be explained in the following manner.

Though part of the Roman Law was formed by judicial decisions, that part of it which was so formed bore an insignificant proportion to the rest of the system. Demand for law of the kind was superseded, in a great measure, by the law which the Prætors introduced in the exercise of their legislative powers. And since the law which they introduced through the *medium* of their general edicts, eclipsed the law which they established by their decisions on specific cases, general attention was fixed on the former, whilst the existence of the latter was generally forgotten. The former being *conspicuous*, and being *conspicuously* the work of the Prætors, it obtained exclusively the name of *jus prætorium*, although the name *might* with equal propriety have been extended to the latter.

The *jus edicendi* (or the power of legislating directly by general edicts or statutes) was not confined to the *Prætores Urbani*. It was exercised by every magistrate of a superior or elevated rank, with reference to such matters as fell within his jurisdiction. It was exercised by the high priests or *Pontifices*

The *jus prætorium*
a part of
the *jus honorarium*.

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maximi. It was exercised by the *Ediles*, or the surveyors and curators of public buildings, roads, and markets. With reference to cases arising in Italy, between provincials and provincials, or between provincials and Roman citizens, it was exercised by the *Prætores Peregrini*. In the outlying provinces, it was exercised by the Proconsuls, and other Presidents or Rulers, to whom the government of those provinces was committed by the Roman People.

The rules which were established by the general edicts of the magistrates who enjoyed the *jus edicendi*, were often considered as constituting a whole, and were styled (when considered as a whole) the *jus honorarium*. For, as every office of an elevated character *honoured* or distinguished the person by whom it was occupied, every office of the kind was styled '*honoros*.' And since the magistrates who enjoyed and exercised the power of promulging general edicts, enjoyed it by virtue of their *honores*, or of the elevated offices which they filled, the law which they created by their general edicts was naturally styled *jus honorarium*.

Hence it follows, that the *jus prætorium* was merely a portion of the *jus honorarium*. But as no other portion of the *jus honorarium* was equal in extent and importance to the *jus prætorium*, the term *jus honorarium* is frequently restricted to the latter.

'Prætores (says Pomponius) edicta proponebant: quæ edicta prætorum *jus honorarium* constituerunt. *Honorarium* dicitur, quod ab honore prætoris venerat.'

'*Jus prætorium* (says Papinian) et *honorarium* dicitur: ad honorem prætorum (or ex honore prætorum) sic nominatum.'

Materials
out of
which the
*jus præto-
rium* was
formed.

The *jus prætorium* (or the law which the *prætores urbani* introduced by their general edicts) seems to have been made by those distinguished magistrates out of the following materials.

First:) They gave the force of Law (through the *medium* of their general edicts) to various customary or merely moral rules which had obtained generally amongst the Roman people.

Secondly:) They imported into the Roman Law (through the *medium* of their general edicts) much of that *jus gentium*, or that æqual or common Law, which had been formed by the *Prætores Peregrini*, and by the Presidents of the outlying provinces.

Thirdly:) So far as the opinion of the Roman public invited or permitted such changes, they supplied the defects of the *jus civile*, or proper Roman Law, and even abolished portions of it,

agreeably to their own notions of public or general utility.—
'Jus Prætorium est (says Papinian) quod prætores (supplendi vel corrigendi juris civilis gratiâ) introduxerunt, *propter utilitatem publicam.*'

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Inasmuch as the body of law, formed by the *Prætores Urbani*, was partly derived from the *jus gentium*, and was partly fashioned upon Utility (as conceived by the Prætors and the public), it was naturally styled the *Equity* of the Prætors, or was said to be founded by the Prætors upon *equitable* grounds or principles. For (as I remarked in a former Lecture) the *jus gentium* was styled *jus æquum*, whilst general utility (or principles of legislation supposed to accord with it) was often styled '*Æquitas.*'

The term Equity. *Æquitas* = *Utilitas*, or other approved principle of legislation. *Jus-titia*, as meaning *utilitas*, or other approved principle, etc.

It is said in a passage of the Digests (referring to a certain rule of the *jus prætorium*) '*hoc æquitas suggerit etsi jure deficiamus.*' That is to say, the rule was commended by general utility (or equity), although it was not recognised by that portion of the Roman Law which was opposed to the *jus prætorium* by the name of '*jus civile.*' Though that which conforms to the *jus prætorium* is commonly styled *æquum*, it is frequently styled '*justum.*' That which does not conform to the *jus prætorium*, is commonly styled '*iniquum,*' and not unfrequently, '*injustum.*'

Inasmuch as the *jus prætorium* grew gradually, or was formed by successive edicts of many successive Prætors, it was not a formal system or digested body of law, but an incondite collection or heap of single and insulated rules. No Prætor thought of legislating systematically: Nor would his stay in office have allowed him to legislate systematically, although the opinion of the public had favoured the attempt, and the supreme or regular legislator had inclined to acquiesce in it. When the Prætor for the time being was struck by a particular defect in the existing law, and when the general opinion invited or provoked him to supply it, he cured that particular defect by a particular provision. And if he thought a particular rule *iniquum* or mischievous, and general opinion favoured or demanded its abolition, he inserted a clause in his edict abolishing the specific mischief.

Jus Prætorium, an incondite heap of insulated rules.

It is also remarkable, that even the substantive law introduced by the Edicts of the Prætors, wore a practical shape or was implicated with procedure.

If the Prætor gave a right unknown to the *jus civile*, he did not give that right explicitly and directly. He promised or declared, through the medium of his general edict, that, in case any party should be placed in a certain position, he, the Prætor,

Implication of substantive law, and, in particular, of substantive prætorian law, with procedure.

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would give him an action, or would entertain an action if he should think fit to bring one. If the Prætor abolished a rule which was parcel of the *jus civile*, he did not abolish or repeal it formally and explicitly. He promised or declared, through the medium of his general edict, that in case an attempt should be made to enforce the rule by action, he would empower or permit the defendant to *except* to the plaintiff's action, or to defeat the plaintiff's action, by demurrer or plea. For example; Many conventions or pacts, which were void *jure civili*, were rendered legally binding by the Edicts of the Prætors. But when a Prætor (through the medium of his general edict) gave validity to a convention which was void *jure civili*, he did not determine formally the rights and obligations of the parties. He merely indicated the *action* which he would give to the promisee, in case the promisor should neglect or refuse performance.

Again: According to the *jus civile*, a party *obliged* (by contract or otherwise) was not freed from the performance of the obligation by a simple promise on the part of the obligee, not to enforce it by action. According to the *jus civile*, the obligor was not freed from performance without a formal release (styled *acceptilatio*) executed by the obligee.

Now the Prætors determined, by their general edicts, that the obligation should be extinguished, in case the obligee merely promised that he would not require performance. But instead of abolishing the old law explicitly and directly, the Prætors gave to the obligor an *exception* founded on the promise. Instead of declaring explicitly that the obligee had no right, they left him (in appearance) his right of action, but empowered the obligor to defeat that apparent right by a defence bottomed in Equity (or in the *jus prætorium*).

This obscure and absurd mode of abrogating law has also been pursued by our own Chancellors. Where a common-law rule is superseded by a rule of equity, it is left to appearance unabrogated and untouched. But in case an attempt be made to enforce it by action, the plaintiff is restrained by the Chancellor from pursuing his empty right.

The only difference between the cases arises from this:

In Rome, there was no *distinct* tribunal affecting to administer a distinct system of Law under the name of Equity. Consequently, the equitable defence was submitted to the Prætor himself, or to the very tribunal in which the action was brought.

In England, there is a distinct Court affecting to administer a distinct system of Law under the name of Equity. Conse-

quently, the action is brought before one Court, and the defence (in the shape of a suit) is submitted to another. The action is brought in a common-law Court, and in that Court the action is not to be resisted.⁵² But the Chancellor (on the application of the defendant) issues an order, restraining the plaintiff at Law from pursuing his legal demand.

In Rome, there was *one* suit. The plaintiff presented his demand (founded on the *jus civile*) to the Prætor; and the defendant submitted his defence (founded on the *jus prætorium*) to the same tribunal.

In England, there are *two* suits. The plaintiff brings his action before a Common-law Court: and the defendant institutes a suit before a Court of Equity, for the purpose of obtaining an order to stay the proceedings of his adversary. In England, the mess of complication and absurdity is somewhat thicker than it was in ancient Rome.

To revert to the subject from which I have digressed for a moment: Wherever the Prætor, by his edict, gave a right, he did not give the right directly and explicitly. He merely promised a certain remedy, in case the right, which he gave *in effect*, should be violated or disturbed. And the nature of the right which he thus virtually created, was implied (or described implicitly) in his description of the remedial process.

Before I quit this subject, I will advert to two peculiarities of the Roman Law language which are extremely perplexing.

Actiones
Utiles et
In factum.

The actions (or rights of action) created by the Prætorian Edict, are frequently styled *utiles*.

It commonly or often happened, that actions given by the *jus prætorium* were *analogous* to actions given by the *jus civile*. Or (speaking more accurately) a case wherein the Prætor gave an action, was often *analogous* to a case wherein an action had

⁵² According to the letter of our statute law this is no longer precisely the case. But the provisions for conferring an equitable jurisdiction on the Common Law Courts, contained in the Common Law Procedure Act, 1854, have proved, especially in relation to equitable defences, of little practical value.

This failure has been owing partly to the extreme pressure of public business on our Common Law Courts, and the consequent reluctance of the judges to give a liberal interpretation to their new jurisdiction. But it is also due to the inadequacy of the enactments them-

selves to effect the purpose which the promoters of the statute may be conjectured to have had in view. If it be wished effectually to invest the Common Law Courts with jurisdiction now properly belonging to Courts of Equity, or *vice versa*, the Court on which the new jurisdiction is conferred must be invested, in relation to the subject-matter, with the *whole powers* of the Court already having jurisdiction. This is the mode adopted in the Acts conferring an equitable jurisdiction on the County Courts; and the successful operation of these Acts is now beyond doubt.—R. C.

been given by the *jus civile*. Although the case for which the Prætor provided, fall not within the provision of the *jus civile*, it fell within the principle upon which that provision was founded. Hence the right of action given by the Prætor was given by way of analogy: by way of analogy to a right of action which had already been given by the *jus civile*. And, being given by way of analogy, the action given by the Prætor was styled *utilis*. For the term *utilis* (as taken in this sense) is not derived from *uti* the verb, but is related to *uti* the adverb. The Prætor gave the action, as he would have given it, if the case, submitted by the applicant, had fallen within the provision of the *jus civile*. An *actio utilis* (as thus understood) may be likened to an action on the Case. For an action on the case (or an action of trespass on the case) was originally an action founded on a writ issued in *consimili casu*: that is to say, in a case analogous to a case for which the ancient law had already provided.

In the language of the Roman Law, *utilis* is often synonymous with 'legally valid or operative.' But, as applied to prætorian actions, it seems to be synonymous with 'analogous.' For, since many prætorian actions were really analogous to actions given by the *jus civile*, prætorian actions were styled *utiles*, even in cases where no such analogy obtained.

Actions given by the Edicts of the Prætors are also frequently styled 'actiones in factum,' or 'actiones in factum conceptæ.' A form of expression which seems to have arisen from a peculiarity in the form of procedure. Where an action was founded on the *jus civile*, it would seem that the plaintiff not only stated his case, but alleged or quoted the law upon which he rested his demand. Whence such actions were styled actions *in jus*, or actions *in jus conceptæ*. But where an action was founded on the *jus prætorium*, the plaintiff merely stated the facts (or case), without adverting to the law which gave him a right to sue. And since the actor merely detailed the facts, his action was styled an action *in factum*, or an action *in factum concepta*. The reason of this difference in forms I am not able to explain; nor, perhaps, is it worth explaining. But it is of importance that the import of the expression 'action *in factum*' should be marked and understood. For, looking at the shape of the expression, it would seem to denote an action allowed by the Prætor arbitrarily, rather than an action founded on the *jus prætorium*, or on the settled Law which the Prætors had introduced by their edicts.

Under the virtual sovereignty of the Emperors or Princes, the Prætors exercised, at least till the reign of Hadrian, the properly legislative powers which they exercised in *liberâ republicâ*, or during the substantial existence of the popular government. But with this difference:

Libera republica, the Prætors exercised those legislative powers by the express or tacit authority of the *sovereign Roman People*:

After the virtual dissolution of the popular government, the Prætors exercised those legislative powers by the express or tacit authority of the *Emperors or Princes*, who at first were substantially though covertly, and at length were substantially and avowedly, monarchs or autocrats in the Roman World.

Till the reign of Hadrian the prætorian law retained the characters which I have just described. It was merely an incondite mass of occasional and insulated rules, that had grown, by a slow and nearly insensible aggregation, through a long succession of ages.

As having been promulged by the Prætor for the time being (or as being comprised in the edict in force for the time being), this body of rules was merely *annual*, or was merely calculated to last during his stay in the office. But most of the rules comprised in that present edict had been *translated* or transferred from the edicts of his predecessors. And (of course) most of them would also be translated into the edicts of his successors; and (by virtue of the *republications* which his successors would give to them) would continue to constitute a large and important portion of the entire Roman Law.

In the reign of Hadrian, the *Jus Prætorium*, or the Prætorian Edict, underwent a considerable change. It was amended or altered by the jurisconsult Julian, and was then promulged, by the command of Hadrian, in the form of a body of rules proceeding *immediately* from the sovereign. Taking the terms *written* and *unwritten* in their juridical and improper meanings, the *jus prætorium* passed from the department of *unwritten*, into the department of *written* law.

As thus promulged by the command of Hadrian, the *jus prætorium* ought not to have retained the name. For, as thus promulged by the command of Hadrian, it was not properly the law of the Prætors, but was Law proceeding *immediately* from the sovereign legislator: Just as the excerpts from the writings of jurisconsults, of which Justinian's Pandects are mainly composed, are *not* (as constituting the Pandects) the production of

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History of the Prætorian edict from the end of the popular government to the reign of Justinian.

Change under Hadrian.

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the original writers, but are properly the production of the monarch who selected, published, and sanctioned them. But, as chiefly consisting of rules which the Prætors had originally introduced, the *jus prætorium* retained its original name, after its nature had been changed by Hadrian's promulgation.

Before the change to which I have now adverted, the general edicts of the Prætors were styled '*perpetual*,' inasmuch as they consisted of general and prospective rules, and were not issued '*prout res incidit*,' or on the spur of specific occasions. They were styled '*perpetual*,' as opposed to the *occasional* edicts which the Prætors issued judicially in particular causes.

But the Prætorian Edict, as promulgated by the command of Hadrian, was styled '*perpetual*,' in another signification of the epithet. As promulgated by the command of Hadrian, the prætorian edict was not *edictum annum*; or it was not calculated to endure to the end of a definite period, and then to cease as Law, unless it should be republished. The Edict amended by Julian, and promulgated by Hadrian, was calculated to endure *in perpetuum*, or until it should be abrogated by competent authority.

The Prætorian Legislation after the change under Hadrian.

Whether the Prætors after this change under Hadrian, continued to legislate *directly* (or to legislate by *general* edicts), is an agitated and doubtful question. It would rather appear that Hadrian, in making the change, intended (amongst other objects) to obviate the necessity and demand for the subordinate legislation of the magistracy.

Sources of the law administered by the tribunals, from Alexander Severus to the accession of Justinian.

Whether such *general* edicts were or were not issued, after this change under Hadrian, it is certain that the Prætors ceased to legislate *directly* in the course of the third century.

At or before the close of the third century, the direct legislation of the Prætors, and also the legislation of the *Populus*, *Plebs*, and Senate, had yielded to the avowed legislation of the virtual monarchs or autocrats.

At or before the close of the third century, and from thence to the accession of Justinian, the *living* Roman Law or the Roman Law *administered and enforced by the tribunals*, was drawn exclusively from the two following sources: namely, the general and special Constitutions of the Emperors or Princes, and the writings of the jurisconsults whose opinions were deemed authoritative.

For though the authors of those writings were not properly *founders* of law, their expositions of principles, and their solutions

of specific cases, were equivalent, in effect, to statutes and judicial decisions; since those expositions and solutions guided the tribunals, in all the cases coming before them, for which the Constitutions of the Emperors had not provided.

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LECTURE XXXVI.

JUS PRÆTORIUM AND ENGLISH EQUITY COMPARED.

HAVING sketched the history of the Prætorian Edict to the accession and reign of Justinian, I will note the effect of its structure on the arrangement of his *Code* and *Pandects*, before I examine the opinions concerning the nature of *Equity* to which I alluded in my last discourse.

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The Roman Law, as it was left by Justinian, lies mainly in his *Code* and *Pandects*: it having been the intention of their imperial projector, that they should comprise the *whole* of the Roman Law to obtain thereafter in the Empire.

His *Institutes* are properly a hornbook for the instruction or institution of students; though, since its publication was *subsequent* to the publications of the *Code* and *Pandects*, this properly institutional treatise was regarded as a *source of law*, in so far as it conflicted with those two compilations, or in so far as it was concerned with matters for which those two compilations had not provided.

The publications of his *Code*, *Pandects* and *Institutes*, completed the design of the imperial reformer. His *Novels*, or new Constitutions, were published subsequently; and are merely partial supplements, or partial correctives, to the three compilations embraced by his original project.

His *Code* and *Pandects* are digests of Roman Law *in force at the time of their conception*: His *Code* being a compilation of imperial constitutions issued by his predecessors and himself; and his *Pandects* or *Digests* being a compilation of excerpts from the writings of the jurisconsults whose opinions were deemed authoritative.

Matter of
the Code
and Pan-
dects.

There are, indeed, in these two compilations (though composed of imperial constitutions and excerpts from writings by jurisconsults) numerous traces of laws established by the *Populus* and *Plebs*, of Consults emanating from the Senate, and of general Edicts issued by the Prætors. For laws of the *populus* and *plebs*, consults of the senate, and general edicts of the prætors,

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are referred or alluded to in many of the constitutions and excerpts of which these two compilations properly consist.

The *matter*, therefore, of his Code and Pandects, may be conceived and described in the following manner:

His Code is composed partly of *edictal* or *general* constitutions: that is to say, statutes made and promulged by Roman Emperors or Princes, in their quality of sovereign legislators. But it also is composed partly of *special* constitutions; that is to say, judicial decretes (and orders analogous to decretes) issued by Roman Emperors in their quality of sovereign administrators.

His Pandects are composed entirely, or almost entirely, of excerpts from writings by juriconsults. Some of these excerpts are analogous and equivalent to statutes: being didactic expositions, in general or abstract terms, of laws or principles of law. Others are mere resolutions of specific or particular questions, and therefore are analogous and equivalent to judicial decisions. —Nay, as having been adopted and promulged by Justinian (who was sovereign in the Roman World), these general expositions and particular resolutions are properly statutes and judicial decisions; although those characters cannot be properly attributed to them as being the productions of their original authors.

Each, therefore, of these two compilations is a compound of statute and *judiciary* law: being partly a collection of statutes proceeding immediately from a sovereign legislator, and partly a collection of judicial decisions proceeding immediately from a sovereign judge.

Arrange-
ment of the
Code and
Pandects.

Though the Code is a collection of imperial constitutions, and the Pandects are a collection of excerpts from writings by juriconsults, the order or arrangement of each of these two compilations is copied from the order of the Perpetual Edict: that is to say, the prætorian edict (or *chain* of prætorian edicts), as altered by the juriconsult Julian, and promulged by the Emperor Hadrian.

This appears from the *Commission* (to adopt a modern expression), by which Tribonian, and certain associates, are commanded to select excerpts from the writings of the authoritative juriconsults, and to place such excerpts in *Pandects* (or in compartments constructed for the reception of them). For in this Commission (which is prefixed to the Digests or Pandects, and is styled Justinian's Constitution, '*De Conceptione Digestorum*') he commands Tribonian and his associates to arrange the selected excerpts, '*tam secundum nostri constitutionem codicis, quam edicti perpetui imitationem.*'

It is probable that the order of the Code and Pandects imitated the order of the Perpetual Edict, for the following reasons or causes.

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In the first place: Neither the laws of the *Populus* or *Plebs*, nor the consults of the Senate, nor the constitutions of the Emperors, nor the judicial decisions of the subordinate tribunals, had ever been digested or even collected. Consequently, The order of the Prætorian Edict (which, though it was a shapeless mass of occasional and insulated rules, was, at least, a *collection* of rules) was the only known model for the arrangement of the projected compilations. And, since Tribonian and his associates were uninventive and servile copiers, they naturally ordered the matter of these compilations according to the solitary pattern which the Edict presented to their imitation.

Like the redactors of the Prussian and French Codes, they *might* have arranged the matter of these compilations, according to the scientific or systematic method which had been pursued by most of the Classical Jurists who had composed elementary treatises for the instruction of students. But this scientific method had never in fact been observed by any but *institutional writers*. And consequently, although it was followed by these slavish imitators in the composition of Justinian's *Institutes*, they never thought of pursuing it in the composition of those larger compilations which were destined to embrace the detail of Justinian's legislation.

In the second place: Many of the writings of the jurisconsults whose opinions were deemed authoritative, were running annotations or commentaries on the *jus prætorium*. And the writings of these jurisconsults at, and long before, the accession of Justinian, were perpetually consulted by judges and practising lawyers. And this may have been a reason for arranging the Code and Pandects according to the order of the Prætorian Edict. Their contents (it may have been thought) would be more accessible to judges and practising lawyers, if arranged according to a method with which they were already familiar.

As I shall shew hereafter, when I touch upon the nameless absurdities of these clumsy compilations, the compilers meant them to contain the whole of the law. Yet many of the provisions contained in them must have been unintelligible, except by referring to the ancient law which they were designed to supersede.

Since the contents of the Code and Pandects were arranged

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according to the order of the Prætorian Edict, their arrangement has as little pretension to the name of *systematic* as if it were merely alphabetical.

Till the reign of Hadrian, the various rules, comprised by the Prætorian Edict, stood in the order of the respective *times* at which they had been introduced through a long succession of ages. Nor does it appear that Julian, who wrought upon the edict under Hadrian, did anything of much importance towards ordering or arranging its contents. As promulged by Hadrian, the Edict of the Prætors (though considerably altered in its details) seems to have retained its ancient and venerable form (or its ancient and venerated deformity).

The arrangement of the Code and Pandects may therefore be suggested by the following comparison :—Let us imagine that the rules or principles which constitute the equity of the Chancellors, stood in the order of the times at which they were respectively introduced : That the Law created by Acts of Parliament were digested in that order : That excerpts from the decisions of our various tribunals (and the writings of our authoritative lawyers), were digested in the same order : And that these two digests of our statute and judiciary law were passed and promulged, by an Act of the Parliament, as the Law to obtain thereafter in England or the United Kingdom.

Now the imagined Digest of our *statute* law would answer *nearly* to Justinian's *Code*. I say 'nearly.' For many of the imperial constitutions of which that chaos is composed, are not *edictal* or *general* constitutions (or statutes promulged by the Emperors in their legislative capacity), but are decrees issued by the Emperors as judges in the last resort.

The imagined digest of our *judiciary* law would correspond to Justinian's Pandects. But with this difference : That the Pandects consist of excerpts from the writings of authoritative lawyers ; whilst the imagined digest in question (though partly consisting of such excerpts) would principally consist of excerpts from the judicial decisions of our tribunals.

Supposition that the direct legislative power exercised by the Prætors was *usurped*,

By many modern writers, the direct legislative power exercised by the Prætors is considered as *usurped*. It is supposed that the changes, which they wrought in the Roman Law, were introduced *per artes* (or surreptitiously), and were a cheat upon the sovereign legislature.

It is said, for example, by Heineccius, in his excellent Antiquities of the Roman Law :

‘Quamvis vero Prætores initio magistratus in legis jurarent : revera tamen leges edictis suis evertabant sub specie æquitatis. Utebantur hanc in rem variis artibus, veluti *fictionibus* ; quando, verbi gratiâ, fingeant, rem usucaptam, quæ usucapta haud esset, vel contra, etc.’⁵³ Now fictions like that which Heineccius here cites (and all the prætorian fictions were equally palpable), could not have deceived any one. The prætorian fictions, therefore, were not *artes*, nor was it the purpose of their authors to introduce their innovations covertly.

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and intro-
duced *per*
artes.

When, for example, the Prætor declared by his edict, ‘that, in certain cases, a thing acquired by usucaption, would be by him considered as not having been so acquired,’ he abrogated a portion of the *jus civile* relating to usucaption, as avowedly and openly as if he had formally annulled it. And all the fictions by which the Prætors upset the *jus civile*, were just as palpable as that to which I now have adverted. They commonly consisted in feigning or assuming, ‘that something which obviously *was*, was *not* ; or that something which obviously was *not*, *was*.’ It is ridiculous to suppose that such fictions could deceive, or were intended to deceive. Nay, the very writers who reproach the Prætors with their *artes*, laugh at the grossness of the so-called *lies*, with which (as they imagine) the Prætors accomplished their unholy purposes.

And the remark which I now have made, will apply to the fictions through which our own tribunals have abrogated certain portions of the statute law. Can it be conceited for a moment, by any reasonable person, that fines and recoveries (for example) ever deceived anybody, or were intended to deceive? that the authors of these absurdities hoped to impose upon the nobility whose great estates they were trying to break down? or that heirs in tail, or remaindermen and reversioners, were *trepanned* out of their interests by that ridiculous juggling? Such a conceit is really more absurd than the foolery to which it relates.

It is, indeed, extremely difficult to determine, why subordinate judges, in innovating on existing law, have so often accomplished their object through the medium of fictions. I incline to impute this curious phænomenon to two causes.

1°. A respect on the part of the innovating judges for the law which they virtually changed. By accomplishing the change through a fiction, they rather eluded the existing law, than formally annulled it : they preserved its integrity to appearance, although they broke it in effect.

⁵³ Antiq. Rom. Syntagma. Ed. Haubold. Lib. I. Tit. 2. c. 24.

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2°. A wish to conciliate (as far as possible) the friends or lovers of the law which they really annulled. If a prætor, or other subordinate judge, had said openly and avowedly, 'I abrogate such a law,' or 'I make such a law,' he might have given offence to the lovers of things ancient, by his direct and arrogant assumption of legislative power. By covering the innovation with a decent lie, he treated the abrogated law with all seemly respect, whilst he knocked it on the head. With regard to their causes and effects, the fictions through which judges innovate on existing law, may be likened to those conventional, and not incommodious lies, through which much of the intercourse of polished society is habitually carried on. If a man, for example, call at your house, and you flatly let him know that you don't wish to see him, you insult him. But if you say, through your servant, 'not at home,' you intimate just as clearly the same thing, and you let him know your meaning in a respectful and inoffensive manner.

Such (I think) are the causes to which we may impute the fictions through which innovations by judges have been so often accomplished.

For many of the *fictions* (or as some choose to call them, *lies*) by which positive law is so often darkened and disgraced, I cannot account. For they seem to be assumed without necessity, or to answer no purpose.

Such, for example, is the fiction, in our own law, 'that husband and wife *are one person*.' Or the fiction, in the older Roman Law, 'that the wife is the *daughter* of her *husband*.' Or the fiction, in the Roman Law (which Sterne has laughed at in his 'Tristram Shandy'), 'that the mother and son *are not of kin*.'

The meaning of these several fictions, is merely this: That the parties have certain rights, or lie under certain duties, or certain incapacities. When it is said, for example, 'that husband and wife are one person,' the meaning merely is, that they lie under certain incapacities with respect to one another. And where those incapacities do not intervene, the fiction of their unity ceases, and they are deemed *twain*.

When it is said 'that the wife is the daughter of the husband,' the meaning is merely this:—That, like his sons and daughters, she is subject to his *dominium* or *potestas*: that, like his sons and daughters, she succeeds to him *ab intestato*: and that succeeding to her husband *ab intestato*, and being to certain

purposes a member of his family, she is excluded from succeeding *ab intestato* to members of the family out of which she married.

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When it is said 'that the mother is not of kin to her son,' the meaning is merely this: That she is not related to the son by *agnation*, or through male progenitors: and that, not being related to her son through *agnation*, she could not succeed to him (*jure civili*) as an *agnat*, though she could succeed to him as his *cognat* by virtue of the prætorian edict which admitted *cognats* to succession.

Why the plain meanings which I now have stated should be obscured by the fictions to which I have just adverted, I cannot conjecture. A wish on the part of the authors of the fictions to render the law as *uncognoscible* as may be, is probably the cause which Mr. Bentham would assign. I judge not, I confess, so uncharitably. I rather impute such fictions to the sheer imbecility (or, if you will, to the active and sportive fancies) of their grave and venerable authors, than to any deliberate design, good or evil.

That the direct legislative power assumed by the Prætors was not *usurped* and was not *assumed covertly*, will also amply appear from the following obvious considerations.

Though it was not assumed, in the beginning, by the direct authority of the sovereign Roman People, it was assumed and exercised, from the beginning, with their tacit approbation. For the law made by the Prætors in the exercise of this legislative power, was made under the eyes of the people, whose interests it concerned, and who, by an expression of their will, might have abolished it, and called its makers to account. And being statute law, briefly expressed and formally and conspicuously promulged, neither the fact of its enactment, nor the purpose at which it aimed, could have been overlooked or misconceived by the most incurious and the least intelligent.

Add to this, that it was made and promulged under the eyes, and therefore with the approbation, of the Tribunes of the people:⁵⁴ who by their *veto* might have prevented it from taking effect, and forced its authors to recall it.

And though the legislative power exercised by the Prætors was not assumed in the beginning by the direct authority of the people, it afterwards was sanctioned directly by acts of the sovereign legislatura. For numberless *leges* of the *populus* and

⁵⁴ Hugo, *Gesch.* pp. 373, 390.

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plebs, with numberless consults of the senate, assume that the *jus prætorium* is parcel of the Roman law, and accommodate their enactments to its provisions: just as acts of our own parliament are moulded and fashioned on the judge-made law of the tribunals.

The obvious truth is, that in Rome (as in most other communities), powers of legislation, direct and judicial, were assumed and exercised by subordinate judges; at first with the tacit approbation, and in time by the direct authority, of the sovereign legislature.

In almost every community, such has been the incapacity, or such the negligence, of the sovereign legislature, that unless the work of legislation had been performed mainly by subordinate judges, it would not have been performed at all, or would have been performed most ineffectually: with regard to a multitude of most important subjects, the society would have lived without law; and with regard to a multitude of others, the law would have remained in pristine barbarity.

Perceiving this palpable truth, the sovereign legislature, in almost every community, has permitted and authorised subordinate judges to perform functions which it ought to exercise itself. And till sovereign legislatures are much better constructed than they have been heretofore, this palpable necessity for judge-made law will inevitably continue.

Judge-made law, or law made by subordinate judges, has therefore obtained, in almost every community, on account of its obvious utility. But the *jus prætorium* was peculiarly acceptable to the Roman people, on account of the mode in which it was made: because it was *not* judiciary law, imbedded in a heap of particular decisions, but was clear and concise statute law, really serving as a guide of conduct. In the Digests, it is favourably contrasted, for this very reason, with judiciary law: the certainty of the one being opposed to the comparative uncertainty and *ex post facto* operation of the other.

‘Magistratus quoque (says Pomponius) jura reddebant. Et ut scirent cives, quod jus de quâque causâ quisque dicturus esset, *seque præmunirent*, edicta magistratus proponebant: quæ edicta prætorum jus honorarium constituerunt.’ Lord Coke’s redactions (if authorised) would have strongly resembled Prætorian Edicts, and been statute: for law given in general formulæ is statute law.

The only circumstance to be regretted is, that the legislative power of the judges is not exercised directly and avowedly with

us, as it was in Rome; that judge-made law is not made in the form of statute law, but in that of judiciary law; that our Courts do not, like the Prætors, promulge their law in the form of general rules, and thus legislate openly instead of covertly.

All the mischief and confusion which have been occasioned by our judge-made law, have arisen from the covert mode in which it has been introduced. But this was the effect of constitutional jealousy, which seldom interferes but to prevent some good. Constitutional jealousy would have forbidden the judges to assume and exercise *eo nomine* the power of legislation, but it allows them, on condition of proceeding bit by bit, to nibble away really good institutions. This same constitutional jealousy is always perverse and absurd. It is always straining at gnats and swallowing camels. (*e.g.* Police, Army.)

I may here remark upon a strange inconsistency of Hugo and other German jurists, who are great enemies of codes, and admirers of customary law, as being made by the people themselves, but who yet profess the greatest admiration of the Roman Law.

As lovers of customary law, they depreciate statute law generally, and especially abhor codes, or compact and systematic bodies of law. As historians and admirers of the Roman Law, they insist (and justly insist) on those excellencies of the *jus prætorium* which I have briefly stated or suggested. They do not perceive that those excellences belong to it *as being a faint approach to a code*: and that they belong to a well-made code in a degree incomparably higher.

[Defective constitution of legislature (where a numerous body).

Changes in state of society, which, owing to such constitution, etc., are not provided for by requisite changes and adaptations of the law. (Hugo, *Gesch.* p. 501.)

Fictions. (Hugo, *Gesch.* pp. 391, 583; *Enc.* pp. 19-28. Savigny *Vom Beruf*, etc. p. 32.)

Causes of the incompleteness of Written Law in all countries: And comparative merits of the various substitutes for direct and supreme legislation.

v. v. Incapacity of hereditary monarchs for the business of legislation.

v. v. Incapacity of legislatures consisting of numerous bodies. Business of legislation ought to be performed by persons who are at once thoroughly versed in the sciences of jurisprudence and legislation, and in the particular system of the given community: The sovereign legislature merely authorizing and checking, and not affecting to legislate itself.

v. v. Peculiar incapacity of bodies. *A fortiori*, applicable to such bodies as the Roman *populus* and *plebs*.]

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Examination of some current and erroneous opinions concerning the *rationale* of the distinction between *strict Law* and *Equity*. Examination of the opinion that the distinction of law into law and equity is *necessary* or *essential*. The distinction is accidental and historical.

Is nearly confined to Roman and English Law.

From the foregoing Historical Sketch of the Prætorian Edict (and of the effect produced by its form on the forms of the Code and Pandects), I proceed to a short examination of some current and erroneous opinions concerning the *rationale* of the distinction between *strict Law* and *Equity*. In the course of which examination, I shall briefly compare or contrast the *jus prætorium*, and the *rules of equity introduced by the English Chancellors*.

It seems to be imagined by many, that the distinction in question is *necessary* or *essential*; or, in other words, that *every* system of positive law is distinguished or distinguishable into Law and Equity. But, in truth, the distinction is confined to the particular systems of *some* particular nations. In every nation, moreover, whose legal system has been distinguished into law and equity, the distinction arose entirely or principally from causes which operated exclusively in that very community. And accordingly, the equity obtaining in any of the systems to which the distinction is confined, is widely different from the equity obtaining in any of the rest.

The distinction, therefore, is not universal and necessary, but is particular and accidental. And, being particular and accidental, it may be styled an *historical* distinction; since its import is not to be found in the principles of general jurisprudence, but must be gathered from the respective histories of the several systems of law to which it is respectively peculiar.

So far is the distinction from being universal and necessary, that I believe it is nearly confined to the Roman and English Law. In most, indeed, of the Anglo-American States, a distinct body of law bearing the name of *equity*, is administered by distinct courts, styled *Courts of Equity*, or is administered, in conjunction with the Common Law, by the ordinary tribunals. But since the law of most of those states is mainly a derivative of the English, it may be said that *equity*, as meaning a portion of positive law, is nearly confined to the Roman and English systems. In other particular systems there is equity, in the other senses to which I shall advert hereafter.

There is equity (for instance), as meaning judicial impartiality: equity as meaning *æquitas legislatoria*, or impartial maxims of legislation: equity, as meaning the *arbitrium* of the judge: or equity, as meaning the parity or analogy which is the ground of the so-called interpretation *ex ratione legis*. But there is no body of positive law, distinguished by the name of equity, and opposed, under that denomination, to other portions of the legal system.

In France, for example, the *arrêts réglementaires*, issued by the ancient parliaments, bore a close resemblance to the edicts of the Roman Prætors. For they were properly statutes, not concerned exclusively with mere procedure or practice, and often annulling or modifying laws proceeding immediately from the sovereign legislature. But the law made by the parliaments through these *arrêts*, never acquired the name of equity; nor was it, I believe, distinguished from the rest of the legal system, by any appropriate denomination. And, in France, there certainly was no equity resembling the body of law which in England has gotten that name. There was no body of law styled 'equity,' and exclusively administered by extraordinary tribunals styled 'Courts of Equity.'

The origin and history of the peculiar Courts in this country, styled Courts of Equity, has been given with great clearness by Blackstone, in probably the best chapter of his whole work. From the facts detailed by him, it is obvious that equity arose from the sulkiness and obstinacy of the Common Law Courts, which refused to suit themselves to the changes which took place in opinion and in the circumstances of society. If the Courts of Common Law had not refused to introduce certain rules of law or of procedure which were required by the exigencies of society, the equitable or extraordinary jurisdiction of the Chancellor would not have arisen, and the distinction between law and equity would never have been heard of. If, for instance, the Common Law Courts would have extorted evidence from the parties, plaintiffs would not have had recourse to the Chancellor, in cases in which they required the power of interrogating the defendant. If, again, the Common Law Courts would have consented to enforce certain trusts, trusts as a subject of the jurisdiction of Courts of Equity would never have been heard of. There would indeed have been trusts, and suits in relation to trusts, these being involved in almost all law, but those particular classes of trusts which are enforced by Courts of Equity would never have been heard of, as distinguished from others. Enterprising judges of the Courts of Common Law have even, at comparatively recent periods, tried to get back the jurisdiction which their predecessors had not thought fit to exercise. Lord Mansfield, for example, made several such attempts; and was baffled. Even that stickler for antiquity, Lord Kenyon, in one instance successfully attempted the same thing: in the case of *Read v. Brookman*, when he took upon himself to dispense with the profert of a bond, and enable parties when unable to produce

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the bond to prove that it had existed and had been lost : which could formerly be done only in a Court of Equity. Whether it is desirable that judges should thus break through established rules, by piecemeal, for the sake of some small improvement is another question. I am myself inclined to the opinion that these attempts to alter the law in little bits, are productive of more mischief by thickening the general confusion, than of good by their direct operation. I only adverted to these facts because they strikingly illustrate the absurdity of the distinction between equity and law.

Not only is this verbal distinction peculiar to the Roman and to the English Law, but it means in each of those systems, something peculiar to those systems respectively.

From the historical sketch given in former Lectures, it has been seen how peculiar was the origin of the prætorian law. The history of the equitable jurisdiction of the English Chancellors may be found in Sir William Blackstone, and in a work of Chief Baron Gilbert.

I shall contrast the two systems, for the purpose of shewing how dissimilar they are, and of adding a few short remarks.

Differences between Roman and English Equity.

The first difference is, that the prætorian equity was administered by the ordinary civil tribunals ; English equity, by an exceptional or extraordinary tribunal. The equity of the prætor resembles in this respect not the equity of the Chancellor, but rather the corrections made by the common-law tribunals to the statute law : whereas the English Courts of Equity not only innovate on the law made by the sovereign legislature, but on that made by the ordinary subordinate tribunals. To have resembled English equity, the equity of the Romans should have been administered, not by the prætor urbanus, but by an extraordinary prætor.

A second, and still more important, difference is, that the equity administered by the Roman prætors was *statute* law, or law promulged in an abstract or general form : whereas all or almost all Chancery law is not *statute*, but *judiciary* law.

The Chancellor, as Chancellor, or as properly exercising his extraordinary jurisdiction, makes and promulges, as far as I am aware, no general rules whatever, except rules of practice or procedure. In Bankruptcy indeed he occasionally establishes general rules ; but he can scarcely be considered to judge Bankruptcy causes by virtue of his extraordinary jurisdiction in Chancery, but rather by a special jurisdiction under special Acts of Parliament.

A third distinction between the equity of the Roman and that of the English law consists in this: that, as might have been expected, the subjects with which they are conversant are widely different.

It is impossible to compare the subjects in detail, since it would require volumes to enumerate them. I shall merely mention two or three remarkable cases to shew the extent of the dissimilarity.

The Prætors, by gradual innovations, altered the whole law on the important subject of succession *ab intestato*, by letting in cognates or relations in the female line, who were nearer of kin, in preference to agnates or relations in the male line, to whom succession *ab intestato* was originally confined, the female line being entirely excluded. The law on this subject, as laid down in Justinian's Code and Novels, is entirely copied from the prætorian equity; it formed no part of the old Roman Law or custom, but originated in the prætorian edicts, which have thus formed the foundation of the law obtaining on this great subject in England and throughout Europe.

Under the influence of similar good intentions the prætors gradually limited the power of testamentary bequest. By the twelve tables a testator was empowered to dispose of his property *ab libitum*.⁵⁵

The prætors afterwards took upon themselves to set aside wills by which a father disinherited his children, under the pretext that an act so inofficious, and denoting so insane a forgetfulness of moral obligation, might be assumed to proceed from actual mental alienation. And this was the origin of the *legitima portio* of the Roman Law, the *legitime* of French Law.⁵⁶

⁵⁵ A different view, however, of the original intention of this law of the Twelve Tables will be found in the able and ingenious chapter on the history of testamentary succession in Maine's *Ancient Law*.—R. C.

⁵⁶ I should think it probable that the *legitime* of the old French law, as it existed in the *Pays de Coutume*, had a more homely, though not less venerable origin, in the archaic notion of the community of goods in the family subject to the right of administration of the husband and father. To a similar origin, and not to a Roman source, I think, should be referred that division of the movable goods which in the twelfth century was common to England and Scotland, and which in the latter country remains unchanged to this day. The division is tripartite, if wife and children

both survive; bipartite, if wife only or children only. One share is subject to the disposal of the deceased; the remaining shares belong to the wife and children respectively. The children's share, in Scotch law, was anciently and properly described as the *bairns' part*; but when the study of the civil law became prevalent, it was improperly and by analogy styled the *legitim*. The division obviously corresponds neither to the *quarta legitima* of the middle Roman law, nor to the rule adopted by Justinian. That the same principle of division anciently obtained by the law of England, is testified by the high authority of Glanville (book vii. c. 5, *temp.* Henry II.) It is also recognised by the Council of Cashel (A.D. 1172, Ireland) as the basis of an arrangement between the claims of the church on the

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For, first, when the children were entirely passed over, the testator was pronounced to be insane; and finally the same conclusion was drawn, if he did not leave to each a certain portion. And in time this determinate portion, which the testator was compelled to leave to each of his children, on pain of having the will set aside, came to be adopted by the sovereign legislature, and now obtains as law in probably every country in Europe except England.

That institution which Mr. McCulloch and others have imagined to be jacobinical and revolutionary, is, in fact, about 2100 years old. The Constituent Assembly in France did not establish the law, but only a little enlarged the *légitime*, and somewhat abridged the power of willing which existed under the ancient laws of France.

Thus completely to alter the law on the important subjects of succession and testamentary disposition, as was done by the Roman Prætors, is certainly monstrous. Our Courts of Equity have never meddled with either subject. The maxim, *æquitas sequitur legem* has in general been strictly adhered to.

Another striking distinction between the equity administered by the Roman Prætor and that administered by the English Chancellors is the following:—

One of the principal subjects of the jurisdiction of our Courts of Equity, is what are called technically *trusts*: not that trusts are peculiar to equity, since they are of the essence of all law whatever; but that there are certain trusts which are not enforced by the ordinary tribunals. In the Roman Law there were also what were called *fideicommissa*, equivalent to trusts; but these, it is remarkable that the tribunals and the prætors themselves would not enforce; they were first enforced by the Emperors. It was Augustus who gave to extraordinary prætors, called *prætores fideicommissarii*, the power of enforcing trusts which had never been enforced by the ordinary prætors; and these trusts came in time to occupy as conspicuous a place in

one side and those of the family on the other (Wilkins' *Concilia*, vol. i. p. 473, Art. 6). The 'bairns' part' in Scotland has a still more venerable authority, namely, the *Leges Burgorum* of David I. (1124-1153), a document, unlike some others ascribed to the 'Scotch Justinian,' of unquestioned genuineness. It is there stated, 'Consuetudo est omnibus burgis Scocie a tempore de quo non extat memoria in contrarium quod si aliquis burgensis liberos procreaverit de uxore sua legitima et ipse decedat, tercia

pars omnium bonorum debetur filiis et filiabus ipsorum' (*Leges IV. Burgorum*, c. 115: vol. i. of Thomson's *Acts*). These laws of the four burghs, one of which was Newcastle, are also valuable collateral evidence of contemporary English customs. The shares of the wife and children appear to have vanished in England owing to the accident of their having been marked by the ambiguous word *rationabiles partes* (see Blackstone, vol. ii. p. 492).—R. C.

the Roman Law, as trusts occupy in our own. Thus, then, one of the chief subjects of the equity jurisdiction of the Chancellor was completely excluded from that of the Roman prætor.

The only resemblances between Roman and English equity are, in fact, two. First, they both are unsystematic in their form, and were introduced by gradual innovations. Neither of them is a *system* of law. It is impossible to give any idea of either, in general or abstract expressions. In order to convey any notion of them, it is necessary to enter into the whole extent of the details. In order to explain to a foreigner the nature of English equity, it would be necessary to enumerate all the cases in which the Chancellor had interposed to supply or correct the defects of the law administered by the Common Law Courts. The notion that there is any essential or necessary distinction is the merest absurdity.

The other resemblance is, that in both cases the party said to administer equity affects not to alter the other system, but to correct or supply its deficiencies. In ostent, or to appearance, the law which is superseded still continues to exist; so that there are two systems going at the same time, containing contrary provisions as to the same matter; one of them the shadow of a law which has been superseded but is feigned still to exist as law, the other the law which has superseded it.

Another erroneous notion frequently entertained concerning Equity, is, that it is the scope and function of Equity to supply the defects and correct the errors and iniquities of Law. This is a very prevalent notion, and seems to have been borrowed from a passage of Papinian, quoted in my last Lecture. This, however, is not a description of Equity as a species of Law, but of *æquitas legislatoria*, or good legislation, by whatever parties introduced. What is here represented as the peculiar object of Equity, is in truth the scope or purpose of all law. What else can be intended by making new law, than to cure the faults or supply the deficiencies of the old? And this is equally true, whether the law be made by one party or another. The above description of Equity is as applicable to the Common Law judges when they introduce new rules of law, as to the Chancellor. It is applicable equally to the legislative functions of Parliament. It is impossible to give any description of equity which shall mark out equitable legislation from any other good legislation.

Another very common error is to suppose that equity is not a body of laws or rules, but is moulded at the pleasure of the tribunals: that, in short, equity as meaning law, is equity as

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meaning the *arbitrium* of the judge. This is an error of which, strange as it may appear, even English lawyers of considerable reputation have been guilty. I remember that Mr. John Williams, in Parliament, a few years ago, quoted as applicable to the Courts of Equity of the present day, a passage of Selden written 200 years ago, in which he describes Equity as being regulated by the Chancellor's conscience, and compares such a mode of administering justice in point of certainty to the regulation of it by the length of the Chancellor's foot.

This description is altogether inapplicable to the Chancellor's jurisdiction at present, when he is as much bound by precedents, and has as little left to his discretion as any other of the judges. It is obvious, that a Court which does not follow any law or precedent, but decides arbitrarily in every case, could not exist in any civilised community. For, by the uncertainty it would introduce, it would defeat all the ends of law, more than an army of robbers.

The first decision on each point must have been arbitrary, but not those which followed it. Yet this error is entertained by most foreign jurists who have written about English Equity; although the Germans, at least, are well acquainted with the Roman Law, and with the tralatitious edicts of the prætors; and it might have occurred to them that the same motives which induced the prætor to copy the edict of his predecessor, must naturally determine every Chancellor to abide by the decrees of former Chancellors.

LECTURE XXXVII.

STATUTE AND JUDICIARY LAW.

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Subjects of
Lecture.

IN the following discourse, I shall call your attention to a few of the numerous differences which distinguish *statute law* (or law made by direct, or proper legislation) from *judiciary law* (or law made by judicial, or improper legislation). And having stated or suggested a few of those numerous differences, I shall remark upon the advantages and disadvantages of judicial or improper legislation, and the possibility of excluding that prevalent mode of legislation, by means of *codes*, or *systems of statute law*.

I would briefly remark, before I proceed to the former subject, that I do not mean exclusively, by the term 'statute law,' statute law made directly by sovereign or supreme legis-

latures: and that I do not mean exclusively, by the term 'judiciary law,' judiciary law made directly by subordinate judges or tribunals. As I have shewn sufficiently in preceding lectures, there is no necessary connection between *direct* and *supreme*, or between *judicial* and *subordinate* legislation. Statute law may proceed directly from subject, or subordinate authors: whilst a monarch or supreme body may exercise the judicial powers inhering necessarily in the Sovereign, and therefore may be directly the author of law made in the judicial manner.

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By the opposed expressions 'statute law,' and 'judiciary law,' I point at a difference (not between the *sources* from which law proceeds, but) between the *modes* in which it begins. By the term 'statute law,' I mean any law (whether it proceed from a subordinate, or from a sovereign source) which is made directly, or in the way of proper legislation. By the term 'judiciary law,' I mean any law (whether it proceed from a sovereign, or a subordinate source) which is made indirectly, or in the way of judicial or improper legislation.

Having premised this explanation, I call your attention to a few of the numerous differences which distinguish *statute* from *judiciary* law.

The principal or leading difference between those kinds of law, is, I apprehend, the following:

A law made judicially is made on the occasion of a judicial decision. The direct or proper purpose of its immediate author is, the decision of the specific case to which the rule is applied, and not the establishment of the rule. Inasmuch as the grounds of the decision may serve as grounds of decision in future and similar cases, its author legislates substantially or in effect: And his decision is commonly determined (not only by a consideration of the case before him, but) by a consideration of the effect which the grounds of his decision may produce as a general law or rule. He knows that similar cases may be decided in a similar manner; and that the principles or grounds of his decision may therefore be a *law* by which the members of the community may be bound to guide their conduct.—But, this notwithstanding, his direct and proper purpose is not the establishment of the rule, but the decision of the specific case to which he applies it. He legislates *as properly judging*, and not *as properly legislating*.

The principal or leading difference between statute and judiciary law.

But a statute law, or a law made in the way of direct legislation, is made solely, and is made professedly, *as* a law or rule. It is not the instrument or mean of deciding a specific case, but

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The principal difference between statute and judiciary law lies in a difference between the forms in which they are respectively expressed.

is intended solely to serve as a rule of conduct, and therefore to guide the tribunals in their decisions upon classes of cases.

The principal difference, therefore, between statute and judiciary law, lies in a difference between the forms in which they are respectively expressed.

A statute law is expressed in general or abstract terms, or wears the form or shape of a law or rule.

A law (or rule of law) made by judicial decisions, exists nowhere in a general or abstract form. Before it can be known, it must be gathered from the grounds or reasons of the specific decision or decisions by which it was virtually established. It therefore is implicated with the peculiarities of the specific case or cases, to the adjudication or decision of which it was applied by the tribunals. In order that its import may be correctly ascertained, the peculiar circumstances of the cases to which it was applied, as well as the general propositions which occur in the decisions, must be observed and considered. For those general propositions being thrown out by the tribunals with a view to the decision of a specific case, they must be taken in conjunction with, and must be limited by, the specific or individual peculiarities by which that case was distinguished. Such general propositions, occurring in the course of a decision, as have not this implication with the specific peculiarities of the case, are commonly styled extra-judicial, and commonly have no authority.

In short, although a rule or principle is established by the decision or decisions, and is applicable and actually applied to subsequent and resembling cases, that rule or principle lies *in concreto*, and must be gotten from the decisions by which it was established, through a process of abstraction and induction. Before we can find the import of the general principle or rule, we must exclude the peculiarities of the cases to which it was applied, and must consider the decision to which the tribunal would have come, if its decision had not been modified by those specific differences.

Looking at the *general reasons* alleged by the Court for its decisions, and *abstracting those reasons from the modifications which were suggested by the peculiarities of the cases*, we arrive at a *ground* or *principle* of decision, which will apply universally to cases of a class, and which, like a statute law, may serve as a rule of conduct.

But without this process of abstraction, no judicial decision

can serve as a guide of conduct, or can be applied to the solution of subsequent cases. For as every case has features of its own, and as every judicial decision is a decision on a specific case, a judicial decision *as a whole* (or as considered *in concreto*), can have no application to another, and, therefore, a different case. /

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And here I will remark (before I proceed further) an enormous fault of Justinian's Pandects and Code, considered as a *code* (in the modern acceptance of the term): that is to say, as a body of general rules.

An enormous fault of the Pandects and Code, considered as a *Code*.

Though much of his Code consists of edictal or general Constitutions (which, as I have stated already, are statute laws), much of it consists of constitutions which are special or particular: that is to say, which are judicial decisions of the Roman Emperors as the supreme judicatory of the empire, and not, like the edictal constitutions of the same emperors, general laws or rules.

Consequently, his Code is a compilation of statutes, and of judicial decisions: a heterogeneous mass of objects having no other relation, than that they are all of them *Imperial Constitutions*: that is to say, statutes and other orders emanating from the Emperors directly, and not emanating directly from subordinate legislatures or tribunals.

His Pandects (as I stated in my last Lecture) consist mainly of excerpts or fragments from the writings of celebrated and authoritative jurisconsults. But most of those writings were *casuistical*, or consisted of opinions of the writers on specific or particular cases. They consisted of applications of actual law to specific cases; or of applications to specific cases, of law *anticipated* by the writers: that is to say, of law, which (in the opinion of the writers) the tribunals would probably emit, in the event of the cases in question coming under judicial cognisance.

Most of those writings, therefore, were closely analogous to compilations of judicial decisions: The only difference being, that judicial decisions are opinions pronounced by sovereign authority, whilst the decisions or opinions, which were contained in those writings of jurisconsults, were decisions or opinions on particular cases, emitted by private or unauthorised persons. [But were rendered law by Justinian's sanction: i.e. tantamount to judicial decisions.]

Some of the writings of jurisconsults, from which excerpts are inserted in the Pandects, were undoubtedly didactic: that is to say, they consisted of expositions, in general terms, of the Roman Law. And, by consequence, they are more analogous to

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statutes than to judicial decisions. [And were rendered such, through Justinian's ordination and promulgation.] They consist of expositions of law in abstract or general terms, as statutes consist of commands conceived in similar expressions. The difference between those writings and statutes or legislative enactments, mainly consists in this: that statutes are general rules set by sovereign authority; whilst the writings in question (though conceived in general expressions) were merely expositions of law by private or unauthorised lawyers.

The literal meaning of the words in which a statute is expressed (or their grammatical, customary, or obvious meaning) is the primary index to the sense which the author of the statute annexed to them: Or (changing the phrase), it is the primary index to the intention with which the statute was made, or the primary index to the law which the legislature intended to establish.

But the interpreter regarding and consulting the literal meaning of the words, may find that the intention which the legislature held is indeterminate and dubious: that is to say, he may not be able to discover in the literal meaning of the words, any determinate purpose that the legislature may have entertained. Now, if he cannot discover in the literal meaning of the words, any such definite and possible purpose, he may seek in other *indicia*, the intention which the legislature held: He may seek it, for example, in the reason of the statute, as indicated by the statute itself; or in the reason of the statute, as indicated by the history of the statute; or in the clear enactments of other statutes made by the same legislature *in pari materia*.

But if he be able to discover in the literal meaning of the words, any such definite and possible purpose, he commonly ought to abide by the literal meaning of the words, though it vary from the other indices to the actual intention of the legislature. Or (changing the phrase), though the literal meaning of the words vary from the other *indicia*, he commonly should take the intention which their literal meaning may point at, as and for the intention with which the statute was made. For by reason of the abstract form which is given to a statute law, the very words of the statute are almost parcel of the statute. The terms through which the legislature tried to convey its intention, were probably measured as carefully as the intention which it tried to convey. And the interpreter ought to infer (unless the contrary manifestly appear), that it employed

them with the obvious meaning which custom has annexed to them, and not with a sense which is unusual, and therefore recondite and obscure.

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If the literal meaning of the words were not the primary index (or were not scrupulously regarded by the interpreter), all the advantages (real or supposed) of statute legislation would be lost. For the purpose is, to give an index more compendious, compact (or lying together), and therefore less fallible, than is that to a judiciary rule. But if the interpreter might, *ad libitum*, desert the literal meaning, no such index could be given.

In the case, therefore, of a statute, the primary index to the law which the lawgiver intended to establish, is the grammatical sense of the words in which the statute is expressed.

(But the primary index to a rule created by a judicial decision, is not the grammatical sense of the very words or terms in which the judicial decision was pronounced) by the legislating judge: And, *a fortiori*, it is not the grammatical sense of the very words or terms in which the legislating judge uttered his general propositions. (As taken apart (or by themselves), and as taken with their literal meaning, the terms of his entire decision (and, *a fortiori*, the terms of his general propositions) are scarcely a clue to the rule which his decision implies.) In order to an induction of the rule which his decision implies, their literal meaning should be modified by the other indices to the rule, from the very commencement of the process. From the very beginning of our endeavour to extricate the implicated rule, we should construe or interpret the terms of his entire decision and discourse, by the nature of the case which he decided; and we should construe or interpret the terms of his general or abstract propositions, by the various specific peculiarities which the decision and case must comprise. For it is likely that the terms of his decision were not very scrupulously measured, or were far less carefully measured than those of a statute; insomuch that the reasons for his decision, which their literal meaning may indicate, probably tally imperfectly with the reasons upon which it is founded. And his general propositions are impertinent, and ought to have no authority, unless they be imported necessarily (and therefore were provoked naturally) by his judicial decision of the very case before him.⁵⁷)

⁵⁷ Nor is it necessary, that the general grounds should be expressed by the judge. In which case, the only index is, the specialities of the decision as construed (or receiving light) from the nature or class of the case. An inference *ex rei natura*.—See *Thibaut* and *Mühlenbruch*.

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Most, however, of the writings of jurisconsults (of excerpts from which the Pandects are composed), are rather opinions on specific cases, than expositions (in abstract terms) of the Roman Law.

A large portion of the Code, and a larger portion of the Pandects, consist not of general rules (or of statute laws), but of judicial decisions (or of opinions analogous to such decisions), from which rules must be gathered by a process of abstraction and induction.

And, what is worse, the portion of the Code and Pandects which consists of such decisions and opinions, is constructed with so little reflection and so little skill, that the general reasons or principles which were the bases of the decisions and opinions are often extremely uncertain.

As I have stated already, the general propositions which occur in a judicial decision, must always be taken with reference to the specific peculiarities of the case. For, as the proper purpose of the judge is the decision of the specific case, any general proposition which does not properly concern it is extrajudicial and unauthoritative. And (moreover) as the judge is not (like the legislator) occupied in constructing a rule, his general propositions are often crudely expressed, and must be carefully construed by a constant reference to his direct and proper purpose. Any of his general propositions, taken by itself, is commonly broader or narrower than the intention which he really entertains. The inaccurate expressions in which it is conveyed, must, therefore, be enlarged or restricted by the scope of his entire discourse. And the scope of his entire discourse cannot be known with assurance, unless the case which he decides is known in all its detail.

But, for the sake of conciseness, or for the sake of getting at propositions of an abstract or general form, the facts of the cases contained in the Code and Pandects are often suppressed by the compilers. The general propositions contained in the special Constitutions (or contained in the analogous opinions of the jurisprudential writers), are detached from the facts to which they were applied, and which are requisite guides to their exact import.

Consequently, before we can arrive at their exact import, we must perform a double process. From the remaining fragments of the particular case to which a proposition of the kind was applied by the judge or jurisconsult, we must gather the residue of that specific case. And having thus conjectured

the subject of the decision or opinion, we must collect the import of the proposition (as a general principle or rule), by the process of abstraction and induction to which I have already adverted.

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Conceive a general proposition of my Lord Eldon, detached from the case in which it occurs, and from the careful limitations (suggested by the peculiarities of the case) with which the proposition is guarded.

Now a collection of propositions so detached (and of which the exact import must therefore be extremely uncertain), will afford a conception of most or much of the matter, which Tribonian and his associates inserted in the Code and Pandects, as the future law of the Roman Empire.

It follows from what has preceded, that law made judicially must be found in the general *grounds* (or must be found in the general *reasons*) of judicial decisions or resolutions of specific or particular cases: that is to say, in such *grounds*, or such *reasons*, as detached or abstracted from the specific peculiarities of the decided or resolved cases. Since no two cases are precisely alike, the decision of a specific case may partly turn upon reasons which are suggested to the judge by its specific peculiarities or differences. And that part of the decision which turns on those differences (or that part of the decision which consists of those special reasons), cannot serve as a *precedent* for subsequent decisions, and cannot serve as a rule or guide of conduct.

*Ratio legis
et ratio
decidendi.*

The general reasons or principles of a judicial decision (as thus abstracted from any peculiarities of the case) are commonly styled, by writers on jurisprudence, the *ratio decidendi*. And this *ratio decidendi* must be carefully distinguished from that, which is commonly called *ratio legis*. The latter is the end or purpose which moved the legislator to establish a statute law. Or it is the end or purpose of any of its particular provisions: an end or purpose which is subordinate to the general design of the statute.

Ratio decidendi is itself a law: or, at least, it is the general ground or principle of a judicial decision or decisions. For want of a statute law, it performs the functions of a general rule, or of a guide of conduct. Though not a rule in form, it is tantamount to a general command proceeding from the sovereign or state, or from any of its authorised subordinates. For, since it is its known will that the general reason of a

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decision on a particular or specific case shall govern decisions on future resembling cases, the subjects receive from the state (on the occasion of such a decision) an expression or intimation of its sovereign will, that they shall shape their conduct to the reason or principle thereof.

And here I will briefly remark, that, when I speak of a rule made by a judicial decision, I mean, of course, such a judicial decision as is not a mere application of previously existing law. By such a judicial decision, as is merely an application of previously existing law, no rule is made. In such a decision, the *ratio decidendi* is the general ground of the decision which the judge applied to the given case: that is to say, the general ground of decision is either some statute law, or else the general ground of some anterior decision by which a new rule had been already introduced and created. In every judicial decision by which law is made, the *ratio decidendi* is a *new* ground or principle, or a ground or principle *not previously law*.

The interpretation or construction of statute law, and the peculiar process of abstraction and induction, etc.

It appears, then, from what has foregone, that *ratio decidendi* (or the ground or principle of a judicial decision which is not merely an application of pre-existing law) is itself a law, or performs the functions of a law.

But *ratio legis* is not a law; nor does it perform, in any respect, the functions of a law. It is the general and paramount cause of a *statute* law (or else the particular and subordinate reason of any of its particular and subordinate provisions). The rule to be observed by the governed is not the *ratio legis*, but the *lex ipsa*. The rule to be observed by the governed must be collected from the *terms* wherein the statute is expressed: though, to the end of ascertaining the meaning annexed to those terms by the legislator, the *ratio legis* (as a mean or instrument of interpretation or construction) must commonly be consulted by the judges who apply the statute judicially, and by all who would shape their conduct to the provisions of the statute.

Hence it follows, that the interpretation or construction of a statute law widely differs from the analogous process of *induction*, by which a rule made judicially is collected from decided cases.

Since a statute law is expressed in determinate expressions, and those expressions were intended to convey the will of the legislator, it follows that the import or meaning which he annexed to those *very* expressions is the object of *genuine* interpretation. If those terms be of doubtful import, the *ratio* or

scope of the statute (or even the history of the statute) may be used as an instrument or mean for determining the doubtful import. But if those terms be not doubtful, the certain sense of those terms must be followed by the judge, although it may conflict with the scope of the statute as collected from other *indicia*.

Ratio legis is, as I have said, the scope or determining cause, of a statute law: that is to say, the end or purpose which determines the lawgiver to make it, as distinguished from the intention or purpose *with which* he actually makes it. For the intention which is present to his mind when he is constructing the statute, may chance to differ from the end which moves him to establish the statute. Although he conceive that intention with perfect clearness and precision, and although he express it in the statute with similar clearness and precision, he may not pursue the scope, nor adhere to the principle, of the statute with perfect completeness and consistency. Consequently, notwithstanding the clearness and the precision with which he conceives and expresses his actual intention or purpose, the statute may be fitted imperfectly to accomplish the end or purpose by which he is determined to make it. And hence the spurious interpretation, *ex ratione legis*, through which a statute, unequivocally worded by the lawgiver, is extended or restricted by the judge.

By such extensive or restrictive interpretation the judge may depart from the manifest sense of a statute, in order that he may carry into effect its *ratio* or scope. But, in these cases, he is not a *judge* properly interpreting the law, but a subordinate *legislator* correcting its errors or defects. He supposes the expressions which the lawgiver *would* have used (or he supposes the provisions which the lawgiver *would* have made), if the latter had expressed his intention in appropriate terms (or had pursued the scope of the statute in a consistent manner): And those supposed expressions, or those supposed provisions, he *substitutes* for the clear expressions which the lawgiver has actually used, or for the provisions which the lawgiver has indisputably made. This, however, is not *interpretation*, but a process of legislative amendment, or a process of legislative correction, which lays all statute law at the arbitrary disposition of the tribunals.

In the process of interpretation (properly so called), the purpose, therefore, is to get at the meaning of the expressions in which the legislator has attempted to convey his intention. For, owing to the abstract form of a statute law, the very terms

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in which it is expressed are necessarily the main index to the legislator's purpose.

But in the analogous process of induction, by which a rule of law is extracted from judicial decisions, that scrupulous attention to the language used by the legislating judge would commonly defeat the end for which the process is performed. As the general propositions which the decision contains are not commonly expressed with much premeditation, and as they must be taken in connection with all the peculiarities of the case, it follows that the very terms in which those propositions are clothed are not the main index to the *ratio decidendi*;—to the general rule or principle which that decision established, and which is the governing principle of the case awaiting solution.

In short, a statute law is expressed in general or abstract terms which are *parcel* of the law itself. And, consequently, the proper end of interpretation is the discovery of the meaning which was actually annexed by the legislator to those very expressions. For if judges could depart *ad libitum* from the meaning of those expressions, and collect the provisions of the statute from other *indicia*, they would desert (generally speaking) a more certain, for a less certain guide.

But a rule of law established by judicial decision, exists nowhere in precise expressions, or in expressions which are *parcel* of the *ratio decidendi*. The terms or expressions employed by the judicial legislator, are rather faint traces from which the principle may be conjectured, than a guide to be followed inflexibly in case their obvious meaning be perfectly certain.

Broad as the distinction is between the interpretation of statute law and the analogous process of induction by which a rule is extracted from a judicial decision or decisions, the two distinct processes have commonly been confounded by those who have written on the interpretation of the Roman law.

As I have remarked above, a part of Justinian's Code consists of *edictal* Constitutions, or of proper or statute laws made and promulgated by the Emperors as legislators. But a part of it consists of *special* Constitutions; that is to say, of judicial decisions by the Emperors as the supreme judges of the Empire: whilst the Pandects consist of excerpts from the writings of jurists, which not uncommonly are solutions of cases, and closely analogous to judicial decisions.

[Owing to the sanction imparted to them by the Emperor, they are substantially judicial decisions.]

Now most of the modern Civilians who have treated of interpretation, have applied to the *statute law* contained in Justinian's compilations, and to the *decisions* and *casuistical solutions* which the compilations also comprise, the *same* rules of interpretation or construction.

For example: They have confounded *extensive* interpretation of statute law with the application of a decided case to a resembling case.

The so-called *extensive* interpretation of statute law *ex ratione legis*, is the extension of the provisions of the law to a case which they do not comprise, because the case falls within the scope of the law, although the provisions of the law do not include it. There is truly an *extension* of the law.

But the application of a decided case to the solution of a similar case, is the *direct application* of the judiciary law itself, and not the *extension* of the law agreeably to its reason or scope. For, here, the law cannot be extended agreeably to the reason of the decision, inasmuch as the reason of the decision (or the ground or principle of the decision) is itself the law. The application, therefore, of a decided case to the solution of a resembling case, is the *direct subsumption* of a case to which the law itself directly applies, and not the extension of a law *ex ratione ejus* to a case or *species obveniens* which the law does not embrace.

[v. v. The way in which they have confounded their subject, from not perceiving the distinction to which I have now adverted.

‘Ampliat istam regulam ut tum maxime procedat si ratio in lege⁵⁸ sit expressa; tunc enim non est extensio sed potius comprehensio. Habetur enim ratio in lege expressa pro lege generali.’⁵⁹]

Again: One of their commonest rules of interpretation—*cessante ratione legis, cessat lex ipsa*—applies solely to precedents, and does not apply to statute law. For in statute law, the law is one thing, the reason another; the law, as a command, may continue to exist, although its reason has ceased, and the law consequently ought to be abrogated; but there it is, the solemn and unchanged will of the legislator, which the judge should not take upon himself to set aside, though he may think it desirable that it should be altered. But in the case of judiciary law, if the ground of the decision has fallen away or ceased, the *ratio decidendi* being gone, there is no law left.

⁵⁸ Decided case resting upon a ground which (whether it be expressed or not in the case) is in truth the Law.—Marginal Note.

⁵⁹ B. Forster, de Juris Interpretatione, lib. ii. c. 2, quoted by Thibaut, Theorie der logischen Auslegung des römischen Rechts, p. 67.

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Professor Thibaut of Heidelberg (in his Interpretation of the Roman Law) was the first (I believe) who saw distinctly, that the rules of interpretation which will apply to the edictal Constitutions contained in Justinian's compilations, have little or no applicability to those judicial decisions (or to those solutions of cases that are analogous to judicial decisions) which the same combinations also embrace.

It is to be regretted that the excellent work of Professor Thibaut is on the interpretation of the Roman law only, not on the interpretation of law in general; for, consequently, owing to the strong peculiarities of Justinian's compilations it has little to do with the general principles of construction. But I am scarcely acquainted with any book which, within so small a compass, contains so much original thinking. As was said by Gassendi of some work of Hobbes, *parvus est libellus, at medullâ scatet*.

Competi-
tion of
analogies :
—Paley
and
Romilly.

As being connected with the subject which I am now considering, I will advert to an oversight of Sir Samuel Romilly, in his admirable article in the *Edinburgh Review*, on Mr. Bentham's papers relative to Codification.

The passage is as follows :—

'It is very extraordinary, that, with such accurate notions as Paley appears to have had on this subject, he should not have seen, that this "Source of disputation," as he calls it, was peculiar to an unwritten law. He strangely supposes it to belong equally to the Statute as to the Common Law. "After all the certainty and rest," he says, "that can be given to points of law, either by the interposition of the Legislature, or the authority of precedents, one principal source of disputation, and into which, indeed, the greater part of legal controversies may be resolved, will remain still, namely, the competition of opposite analogies." Difficulties undoubtedly often arise in the application of written statutes, and Paley himself has well pointed them out; but they are quite of a different nature from those which attend the administration of the common law, and certainly cannot be surmounted by that competition of opposite analogies which he mentions.'⁶⁰

Now it seems to me, that 'the competition of opposite analogies' (if the phrase mean anything) is just as likely to arise on the application of statute law, as on the application of judiciary law. Paley must be speaking (if he mean anything), not of the discovery of the law by interpretation or other

⁶⁰ Edin. Rev. vol. xxix. p. 224.

induction, but of the application of the law, as already ascertained, to the case which awaits solution.

With regard to the process of interpretation, or the analogous process of induction which I have already described, the phrase 'competition of analogies' has no meaning. The purpose (in the case of the induction) is to deduce the rule of law from the decided case or cases by which the rule was established. If the rule of law was established by *one* decided case the rule cannot have been founded on opposite analogies. If it was established by several cases, it was founded on the resembling, and not on the differing properties of those several cases; so that here also, it was not founded on *opposite*, but on *analogous* analogies.

But with regard to the application of the law to the case awaiting solution, 'the competition of opposite analogies' may certainly arise. For the case awaiting solution may resemble in some of its points the case or cases to which the rule of law has actually been applied. But it may also resemble in other of its points a case or cases from which the application of the law has been withheld. Now, with reference to the rule of law (or with reference to the applicability of the rule to the case which awaits solution), the resemblances of the case to the cases to which the law has been applied, and the resemblances of the case to the cases from which the law has been withheld, are 'opposite and competing analogies:' the first inviting the tribunal to apply the rule; the second admonishing the tribunal that the rule is not applicable.

But this is not peculiar (as Sir S. Romilly supposes) to judiciary law. Wherever law of any kind is to be *applied*, this 'competition of opposite analogies' may embarrass and vex the tribunal.

As being connected with the subject which I am now considering, I will advert to a foolish remark of Sir William Blackstone concerning the judicial decretes of the Roman Emperors.

He tells us that these decretes, 'contrary to all true forms of reasoning, argue from particulars to generals.'

The truth is, that an imperial decree of the kind to which Blackstone alludes, is a judicial decision establishing a new principle. Consequently, the application of the new principle to the case wherein it is established, is not the decision of a general by a particular, but the decision of a particular by a general. If he had said that the principle applied is a new

Blackstone's remark concerning the decretes of the Roman Emperors.^a

^a Vol. i. p. 59.

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principle, and, therefore, an *ex post facto* law with reference to that case, he would say truly. But the same objection (it is quite manifest) applies to our own precedents.

What hindered him from seeing this, was the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges. This being the case, of course there *can* be no *ex post facto* legislation in the English Judiciary law.

Before I proceed to the advantages and disadvantages of judicial legislation, and to the question of codification, I will make a few remarks upon certain topics on which I may touch conveniently at the present point of my Course.

As I observed in former Lectures, judiciary law is suggested by various causes, and often takes from these various causes, various names. With reference to its suggesting causes, it consists mainly of:—

1°. Rules which have grown up by custom or usage, and which become Law by judicial adoption.

Rules which are formed from these by consequence or analogy.⁶³ To law formed in this manner the term 'Customary Law,' is commonly confined.

2°. Rules which are established by judges *ex proprio arbitrio*: i.e., according to their own notions of what *ought* to be Law; whether the standard be utility or any other.

Rules which are formed out of these, in the way of consequence and analogy.

Law formed in this way has received various names. In most of the countries on the Continent it is said to originate in the *usus fori*, '*Gerichtsgebrauch*.' In France it is commonly called '*Jurisprudence*.' In the Roman Law it has no peculiar name; '*Auctoritas*,' etc.: Nor does it seem in that law to have been of any great extent; the use of decided cases as a source of law, having been rendered to a great degree unnecessary by those predeterminations of the Prætors which were contained in their Edicts. In the English Law, it has no peculiar name; the whole of the judicial law being confounded together.

3°. Law fashioned on opinions and practices which obtain amongst lawyers; and which naturally have a great effect upon the decisions of judges.

In Rome, the *Jus Civile*, strictly so called, was entirely

⁶³ Hale, Hist. Com. Law, ch. iv.

formed in this manner. The opinions of experienced jurists were naturally influential with the community and with the courts, and the decisions of the tribunal were frequently fashioned on them. Much law has been thus made in England: by judges adopting the views of authoritative expository writers, or the practice of conveyancers, and enforcing them as law.

4°. Law formed by judicial decisions upon questions which arise out of the statute law.

Decisions on statutes are of two sorts. The judge applies the law to the fact, according to his opinion of the meaning; or (by a process which is generally confounded with interpretation or construction, but which in truth is legislation) he decides according to his own notion of what the legislator ought to have established. By this extensive or restrictive interpretation *ex ratione legis*, much judiciary law grows up. A striking example of this is *equity*, as it is called, of the statute *De Donis*; that is, its application by judges, to cases coming within the predominating purpose of the statute, though omitted out of its provisions. The Statute of Frauds is another striking example. The decisions of the Courts on this single statute are nearly equal in bulk to the whole of the French civil code. The whole of these decisions are judge-made law introduced on the occasion of pretended applications of the statute.

5°. Law framed on foreign law or positive international morality.

Much of the law made in our Ecclesiastical Courts originated in this manner, for the law administered in these courts was mainly fashioned upon the civil and canon law. The law obtaining in the different states of Germany for the most part consists of the Roman Law, that is, of the Roman Law as established by the German legislators and tribunals. It is in force, as German Law, of course, but it is German Law moulded on a Roman model.

In like manner judiciary law, particularly, for instance, that administered in our Admiralty Courts, often originates in positive international morality. As positive international morality (so-called international law) it has no force within any one nation; but a nation may adopt it and enforce it as positive law within itself.

The natural or customary order in which the law of any country arises, or is founded, seems to be this:

^a Savigny, Vom Beruf, etc. pp. 16-19. Hugo, Enc. pp. 25-28.

The order in which law is naturally generated. ^{as}

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- 1st. Rules of positive morality.
- 2ndly. The adoption and enforcement of these rules by the tribunals.
- 3rdly. The addition of other rules drawn from the former by consequence or analogy.
- 4thly. The introduction of new rules by the judges, *proprio arbitrio*; and illations from these.
- 5thly. Legislation proper, by the sovereign legislature, in the same order.
- 6thly. The action and reaction of judicial legislation and legislation proper.

The sovereign legislature by its acts acknowledges the existence of law made by the tribunals, and moulds its own enactments upon it; the application of the law made by the sovereign gives rise to further judicial legislation; and in some cases the sovereign legislature, acting as the supreme judicatory, makes judiciary law by its own judicial decisions.

7thly and lastly: A Code.

The conception of a code, or systematic and complete body of statute law, intended to supersede all other law whatever, does not seem to belong to any age less civilised than our own. It is essentially a modern thought.⁶⁴

Such can hardly be conceived to have been the purpose of Justinian. It does indeed appear from the Pandects, that he intended them and the code to be the only law thereafter to obtain in the Roman Empire; but we can only marvel at the conceit. For so ill did the compilers of those works accomplish their task, that they were scarcely promulgated before he was obliged to add to them a body of Novels as big as themselves, and to set about a new edition of the Compilation.

This, however, is the only example occurring, as far as I am aware, in ancient times, which can be considered as an approach to the conception of a Code. Cæsar's idea does not seem to have gone beyond a compilation of the *leges* of the *populus* and *plebs*; a digest of the then existing statute law.

The conceptions entertained of a Code in modern times have generally been as indistinct as Justinian's.⁶⁵ And this is the chief cause of the imperfections of all recent attempts at codification, and the cause by reason of which the codifiers have left to

⁶⁴ Anciently, all collections of Laws the middle of the last century. First (or legal rules) promulgated by the legislature, were called Codes. The modern examples of such Codes: in Prussia, 1747; Austria, 1753; Russia, 1767; idea of a Code—a complete and exclusive body of law—did not arise till after France, 1793.

⁶⁵ Bentham, Principles, etc. p. 328.

be covered by judiciary law the wilderness which they knew not how to deal with.

Judiciary and statute law often run into one another. An example of this is a declaratory law. A *declaratory law*,⁶⁶ though not a decision upon a question of law in the course of judicial procedure (that is, though it has not necessarily any effect upon the interests of determinate parties), has yet the operation of a judicial decision with respect to cases in general. It is not the establishment of a new law, but determines the import of pre-existing law.

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Cases apparently intermediate between judiciary and statute law.

If it introduce a new rule under colour of explaining an old one, it is not in substance a declaratory law; and is then analogous to the cases in which judges made judicial law, under colour of interpreting statute law, or of getting by induction at prior judge-made law.

If the declaratory law relate to an anterior statute, it is in effect a republication of that statute in a more correct form:— in a form which expresses more precisely the real or supposed intention with which the statute was passed. If it relate to judicial law, it converts judicial into statute law; superseding the authority of the decision upon which the judicial law formerly rested. Thus the Pandects of Justinian may be considered as an express declaration by the Legislator, that certain writings which had acquired authority in the tribunals should thenceforth be statute law. [*Sed quære*, judicial decisions?]

There is the same difference (with regard to the *occasion* of the declaration) between declaratory laws, that there is between original laws: *i.e.* A declaratory law is either emitted as a general rule, independently of a particular incident, or on occasion of a particular incident. Laws of the former sort are, declaratory Acts, etc., Edicts of the Prætor, so far as interpreting: Laws of the latter sort, Opinions given by the Roman Emperors at the instance of particular parties; Opinions which Courts of Justice *might* be authorised to give on occasion of transactions contemplated: Rescripts.⁶⁷

The great difference here (as in original legislation) is this; that in the former case the law is not only formally promulged (which is an accident) but is given in abstract, in the form of a general proposition or propositions detached from any actual incident: in the latter, it is given as part of an opinion or decision upon a particular incident; and must always be taken into

⁶⁶ Bentham, Principles, etc. p. 328.

⁶⁷ See p. 519, *ante*. Falck, § 16. Blackstone, vol. i. p. 86.

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consideration jointly with that incident, in order that we may form a correct estimate of its import.

The Rescripts of the Roman Emperors, though issuing from the legislature, were not statute law. They were either decisions on appeal declaratory ; or instructions how to decide, issued to inferior judicatories.

In England we have nothing analogous to this : Acts of Parliament relating to particular cases are not decisions in the way of appeal, but *privilegia* : and the House of Lords, though it sit as a Court of Judicature, is not the legislature, but only a branch of it. [Provision in Statute of Treasons.⁶⁸]

In France, perhaps the judicial decisions of the *Conseil du Roi*, which, before the Revolution, performed the functions of the present Court of Cassation, may have resembled, in this respect, the rescripts of the Roman Emperors. But whether such decisions were given in the name of the King (who for a century or two before the Revolution was substantially the legislature) I am not able to determine. If not supposed to proceed from him by the advice of his *Conseil*, but to be the act of the *Conseil* itself, sitting as a Court of Cassation, they were *not* analogous to rescripts.

Declaratory laws are sometimes provoked by a particular case, and are so far analogous to judicial decisions.⁶⁸ Such are the laws made by the Prussian Law Commission. If the judges, whose duty it is to decide according to the provisions of the Prussian Code, differ in their interpretation of it, and cannot unravel the meaning, the decision of the last Court of Appeal is referred to the Law Commission, who have power, not to alter the decision as respects the particular case, but to amend the law *in futurum*, and what they promulge is a law declaratory of what shall be deemed law in future on the occurrence of a similar case.

[The matter contained in the following pages formed no part of the Lectures. It was found among loose papers.—S. A.]

Where there is no rule in the system applicable to the case, the judge virtually makes one, if he decides at all, or decides on any general ground.

Now where the judge makes a judiciary rule, he may build it on any of various grounds, or derive it from any of various sources : *e.g.* a custom not having force of law, but obtaining

⁶⁸ Blackstone, vol. iv. pp. 84, 85. See *ante*, p. 520.

throughout the community, or in some class of it; a maxim of international law; his own views of what law ought to be (be the standard which he assumes, general utility or any other).

[All which I will shortly explain elsewhere.]

But it often (perhaps, most commonly) happens, that he derives the new rule, by a consequence built on analogy, from a rule or rules actually part of the system. And it is to the creation of law thus derived from pre-existing law, that the competition of opposite analogies to which judicial legislation is liable, is peculiarly, if not exclusively, incident.

Law thus derived from pre-existing law, has received various names. It is styled by Hale, law formed by illations on anterior law:⁶⁹ by others, law derived from pre-existing law, by consequence or analogy: by others, *jus quod ex jure efficitur argumentando*.⁷⁰ By others it is styled law built upon technical grounds: *i.e.* upon grounds like those of the rules from which it is derived, rather than on considerations of utility which regard the actual state of the community.

The judge makes, and applies to the subjects wanting a rule, a rule analogous to an existing rule (statute or judiciary) which regards analogous subjects. *E.g.*: The extension of a statute unequivocally expressed, to cases embraced by its scope, but omitted by the lawgiver; or its extension to subjects not existing when it was made, but analogous to subjects embraced by its provisions or scope. Or (supposing that promissory notes preceded bills of exchange), the rules applicable to the latter were formed by consequence and analogy from rules regarding the former.

How law thus derived from anterior law is formed.

In every case, therefore, the new rule thus derived is applied to some species or sort of a given genus or kind.

But the rule may be derived from a rule regarding generally the whole *genus*, or from a rule regarding specially some of its species. *E.g.*: A new rule regarding contracts of a species or sort, may be derived from a rule regarding contracts generally, or from a rule regarding specially some other species of contracts. Considering the way in which law is gradually built out, the latter is the more ordinary process.

In either case, the new rule is derived from the pre-existing rule by consequence and analogy, or rather by a consequence founded on analogy. For the new rule is made what it is, *in consequence* of the existence of a similar rule applying to subjects which are *analogous* to (or of the same genus with) the subjects which itself particularly concerns.

⁶⁹ Hale, Hist. Com. Law, ch. iv. *sub fine*.

⁷⁰ Mühlenbruch, vol. i. lib. i. § 42.

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There is, in every case, a consequence, an analogy, and a difference.

The new rule is formed by consequence from the anterior rule. The subjects of the new rule are analogous to those of the old one. But, by reason of the specific difference of the species or sort which its peculiar subjects belong to, the new rule is different from, as well as like, the old one.

However, where the new rule is formed from an old rule regarding the genus generally, the new rule is not co-ordinate with the old one, but is included under it, as the minor of a syllogism is included under the major. But where the new rule is derived from an old rule specially regarding a species or sort, the new rule is merely co-ordinate with the old and is not included in it as a consequence.

And hence probably the difference between rules formed by consequence, and rules formed by analogy.

[*Sed quære.* For, if there were merely a consequence, in the case of the generic rule, there would not be a new rule, but merely a subsumption of the new species under the old one.]

How the competition of opposite analogies may arise.

Subjects calling for a rule, may be like, in some respects, to subjects of anterior rule A; but, in other respects, to subjects of anterior rule B, which is essentially different from A.

The two likenesses are competing analogies. One inviting the judge to model the rule in projection on A; and the other inviting him to model it on B: one inviting him to decide the case analogously (but not exactly similarly) to decisions by A; and the other, etc.

Q. Whether difficulties may not arise from inconsistency of competing rules?

This is the competition specially contemplated by Paley.—He supposes a question which *can only be brought within any fixed rule by analogy, i.e.* which ought to be decided by a rule analogous to a fixed or existing rule. For, if the case were *brought within a fixed rule*, it would be directly subsumed under that rule, and the difficulty would not exist. He commits the usual mistake of supposing that a rule can be extended. Like the mistake of supposing that the judge extends a statute, when he ekes it out by a judiciary rule.

It has been supposed by Sir Samuel Romilly that the competition of opposite analogies could not arise, if the system of law were entirely statute (codified or not).

Now with regard to that competition which is incident to *the application of law*, it is manifestly incident to statute law. For statutes may be inconsistent *inter se*, or a single statute may be inconsistent with itself. Nor is direct legislation, more

than judicial, free from a competition of analogies. For a statute, like a judiciary rule, is often derived, by a consequence founded on analogy, from an anterior statute or an anterior judiciary rule.

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A remarkable example of this is furnished by the legislation of the Prætors, by whom most of the working civil law was formed. Now though they legislated directly (or by way of what the French would call *arrêts généraux et réglementaires*), they legislated, commonly, agreeably to the maxim which has guided the judicial legislation of our own Chancellors, '*Æquitas sequitur legem*:'⁷¹ that is to say, the law which they made, was made by consequence and analogy to the *jus civile* or common law, much more than in pursuance of their own views of public utility. Though this last was consulted too, or their *æquitas* would have been nugatory.

Nothing, indeed, can be more natural, than that legislators, direct or judicial (especially if they be narrow-minded, timid, and unskilful), should lean as much as they can on the examples set by their predecessors. The internal history of almost every system of law, consists mainly in tracing the course wherein the system was formed by successive illations.

Sir Samuel Romilly supposes that the competition of opposite analogies is a means of surmounting the difficulty. It is, in truth, the difficulty to be surmounted. He falls into the mistake of confounding the competition incident to the application, with the competition incident to the creation, of law. This arose from his assuming unconsciously at the moment (against what he had shewn in the text) that common or judiciary law, when virtually made, is only administered or applied.

LECTURE XXXVIII.

GROUNDLESS OBJECTIONS TO JUDICIAL LEGISLATION.

HAVING touched upon a few of the numerous differences which distinguish *statute* from *judiciary* law, I pass to the advantages and disadvantages of judicial or improper legislation, and the possibility of excluding that prevalent mode of legislation, by means of *codes*, or *systems of statute law*.

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I will first consider some groundless objections which are made to judiciary law. I then will remark on some of the evils

⁷¹ Digest, xxii. 5 (De Testibus), l. 14.

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Bentham's
objection to judi-
ciary law,
that it is
not law.

with which it really is pregnant. And having remarked on those evils, I will proceed to the scabrous question of *codification*.

It seems to be denied by Bentham, that judiciary law is properly law: that is to say, that it is law imperative. He says it consists, at the most, of *quasi*-commands: of objects not commands, but merely *analogous* to commands.

This objection I have partly answered in preceding lectures. I will, however, advert to it, for a moment, in the present place.

It appears to me that judiciary law, whether made by the sovereign or by subordinate judges, quadrates with Bentham's own definition of a genuine but tacit command, as given in a note to his 'Fragment on Government.' Where it is perfectly well known to be the will of the legislator that the principles or grounds of judicial decisions should be observed as rules of conduct by the subjects, and that they should be punished for violating them, the intimation of the legislator's will is as complete as in any other case. The *ratio decidendi* of a decision may, perhaps, indeed be that properly called not a law, but a *norma* or model, which the law obliges you to observe, the law itself being properly the intimation of the legislator's will. But this would be equally a reason for excluding from the name *law*, all the expository part of statute law; for instance, the description of the act which is to be done or forborne, previously to ordering that it be done or forborne.

A second
groundless
objection
to judi-
ciary law.

Another objection to judicial legislation which is often insisted upon (and which is urged by Sir Samuel Romilly, in the article already referred to), is also (I think) founded in mistake. It is objected to judicial legislation, that where subordinate judges have the power of making laws, the community has little or no control over those who make the laws by which its conduct must be governed. Now this objection, it is manifest, is not an objection to *judiciary* law, but to law proceeding from authors (judicial or not) who are not sufficiently responsible to the bulk or mass of the community. It applies to statute law made by the Sovereign directly, in case the supreme government be purely monarchical, or in case it consist of a number with interests adverse to the majority. It applies to statute law made by subordinate judges (or made directly by any subordinate legislature), in case that subordinate author be the creature of a monarch or oligarchy, or, for any reason, be too independent of the people. It applies (it is true), to the *decretes* of the Roman Emperors, acting as supreme judges: but

it applies to the Edictal Constitutions of the same Emperors or Princes, acting as sovereign legislators.

In short, the objection is not an objection to judicial legislation, but to *any* legislation of *any* parties who are not sufficiently controlled by positive law, or by the law (improperly so called) which general opinion imposes.

As aimed particularly at *English* judiciary law, the objection in question amounts to this:—that the judges are made by the King, and not by the people or their representatives; and therefore, are prone to regard the sinister interests of their maker, rather than the general interests, or the interests of the community at large.

But the objection in question, as aimed particularly at English judiciary law, would apply to *statute* law, made by the English judges after the manner of the Roman Prætors. It would apply, at least, to such statute law, in a considerable degree. For a legislator going to work in the way of judicial legislation, has certainly more opportunities of covering a sinister intent, than a legislator who sets a rule directly and professedly. A statute law being expressed in an abstract or general form, its scope or purpose is commonly manifest. In case, therefore, its purpose be pernicious, its author cannot escape from general censure. But a law made judicially being implicated with a peculiar case, and its purpose not being expressed in any determinate shape, its author can retract and disavow, with comparative ease, in case his intent be dishonest, and excite attention and criticism.

It is a remark of Kant, that the expression *in abstract and general terms* of a given maxim or principle, affords a proof (or a presumption), that the maxim or principle, as a maxim or principle, is consonant to truth and reason. ‘Der allgemeine Ausdruck einer Maxime zum Beweise dient, sie sey als Maxime vernünftig.’—It certainly affords a proof (or a presumption), that, in the opinion of the party who so expresses the maxim, the maxim is consonant to reason, and may be laid open and bare to the examination of others.

And, moreover, the objection in question, as aimed particularly at English judiciary law, is not an objection to judicial legislation, but an objection to the manner in which the judges are appointed. If their appointment by the crown render them obnoxious to its influence, and if their obnoxiousness to the influence of the crown produce judicial legislation adverse to the general interests, let their appointment be vested in some party

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or another whose interests do not conflict with those of the community at large.

In the last result, indeed, the objection in question, as aimed particularly at *English* judiciary law, is virtually an objection to the constitution or conduct of the sovereign legislature of Britain. For the judicial law made by the English judges (like the statute law made by the Roman Prætors), has been formed under the eyes of the sovereign legislature, has been made with the acquiescence of the sovereign legislature, and has been confirmed, in innumerable instances, by its explicit or tacit adoption in statutes passed by itself.

In short, the objection which I now am considering, is not an objection to *judiciary* law. It is an objection to judiciary law (or to *any* law) which is made by the direct establishment, or by the express or tacit authority, of a *bad* sovereign government: of a government whose interests are adverse to those of the generality of its subjects; or which is too ignorant and incapable, or too indifferent and lazy, to conduct or inspect advantageously the important business of legislation.

A third
groundless
objection
to judi-
ciary law.

Another current objection to judiciary law, is also bottomed, it appears to me, upon a complete misapprehension of its nature. It supposes that judicial legislators legislate arbitrarily: that the body of the law by which the community is governed, is, therefore, varying and uncertain: and that the body of the law for the time being is, therefore, incoherent.

Now this may be true, to some extent, of *supreme* judicial legislation, for the Sovereign in the character of judge (like the Sovereign in the character of legislator) is controlled by nothing but the opinions or sentiments of the community.

But, even in respect of supreme legislation, this objection (like the former) is not peculiarly applicable to judiciary law. It is equally applicable to statute law made directly by the sovereign legislature.

To judiciary law made by subordinate judges (which, in almost every community, forms the greater portion of judiciary law) the objection in question will hardly apply at all. For the *arbitrium* of subordinate judges (like that of the sovereign legislature) is controlled by public opinion. It is controlled, moreover, by the sovereign legislature: under whose inspection their decisions are made: by whose authority their decisions may be reversed: and by whom their misconduct may be punished. Their *arbitrium* is controlled particularly by courts

of appeal : by whose judgments their decisions may be reversed : and who may point them out to general disapprobation, or may mark them out as fit objects for legal penalties.

And (admitting that the objection will apply to that judiciary law which is made directly by subordinate judges) it also will apply, with a few modifications, to all statute law which is established by subordinate authors.

The objection, therefore, in question, is an objection to *subordinate* legislation, rather than to *judiciary* law.

But, owing to the restraints to which I have just adverted, it is clear that subordinate judges will rarely legislate arbitrarily, whether they legislate directly (in the manner of the Prætors by their Edicts) or legislate indirectly (in the manner of our own Courts). Where subordinate judges subvert existing law, they commonly are doing that which the opinion of the community requires ; to which the sovereign legislature expressly or tacitly consents ; and which the sovereign legislature would do directly, if it cared sufficiently for the general interests, or were competent to the business of legislation.

Before I quit the topic which I am immediately considering, I will advert to another cause which controls the *arbitrium* of judges, and makes the rules which they establish by their decisions (or the rules which they establish by direct legislation) consonant with existing law, and consonant with one another.

The cause in question is the influence of private lawyers, with the authority which is naturally acquired by their professional opinions and practices. The supervision and censure of the bar, and of other practitioners of the law, prevent deviations from existing law, unless they be consonant to the interests of the community, or, at least, to the interests of the craft. And though the interests of the craft are not unfrequently opposed to the interests of the community, the two sets of interests do, in the main, chime.

The judiciary law made by the tribunals, is, in effect, the joint product of the legal profession, or rather of the most experienced and most skilful part of it : the joint product of the tribunals themselves, and of the private lawyers who by their cunning in the law have gotten the ear of the judicial legislators. In the somewhat disrespectful language of Mr. Bentham, it is not the product of judge only, but it is the joint product of Judge and Co. So great is the influence of the general opinion of the profession, that it frequently forces upon the Courts the

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}

adoption of a rule of law, by a sort of moral necessity. When the illations or anticipations of lawyers as to what the Courts would probably decide if the case came before them, has been often acted upon, so many interests are adjusted to it, that the Courts are compelled to make it law. What a howl would be set up (and not unjustly) if the Courts were to disregard the established practice of conveyancers; although, until sanctioned by judicial decisions, it is not strictly law. Being constantly acted upon, and engaging a vast variety of incidents in its favour, it performs the functions of a law, and will probably become law as the particular cases arise.

The way in which law is made by private lawyers, is well described in the Digests, by an excerpt from *Pomponius*. 'Constat non potest jus, nisi sit aliquis jurisperitus, per quem possit quotidie in melius *produci*.' This is almost inevitably the growth of law. The laity (or non-lawyer part of the community) are competent to conceive the more general rules: but none but lawyers (or those whose minds are constantly occupied with the rules) can *produce* (or evolve) those numerous consequences which the rules imply, or can give to the rules themselves the requisite precision.

Herr von Savigny describes modern law as composed of two elements, the one element being a part of the national life itself, and the other element being the product of the lawyers' craft. The first he names the *political*, and the last the *technical* element.

Independently of the checks which I have just mentioned, judges are naturally determined to abide by old rules, or to form new ones, by consequence from, or analogy to, the old.

(v. v.) They are naturally determined by two causes.

1. A regard for the interests and expectations which have grown up under established rules: or under consequences and analogies deducible from them.

2. A perception of consequence and analogy: which determines the understanding, independently of any other consideration.

The truth is, that too great a respect for established rules, and too great a regard for consequence and analogy, has generally been shewn by the authors of judiciary law. Where the introduction of a new rule would interfere with interests and expectations which have grown out of established ones, it is clearly

incumbent on the Judge *stare decisis*; since it is not in his power to indemnify the injured parties. But it is much to be regretted that Judges of capacity, experience and weight, have not seized every opportunity of introducing a new rule (a rule beneficial for the future), wherever its introduction would have no such effect. This is the reproach I should be inclined to make against Lord Eldon.

A striking example of this backwardness of Judges to innovate, is to be found in the origin of the distinction between law and equity; which arose because the Judges of the Common Law Courts would not do what they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages. Equity, when it arose, has remained equally barbarous from the same cause: the rule *æquitas sequitur legem* has been too much regarded; a rule which, if followed literally, would leave nothing for the Courts of Equity to perform.

Owing to the causes to which I now have adverted, and to others which I pass in silence, there is more of stability and coherency in judiciary law, than might, at the first blush, be imagined.

And here I must stop for the present. In my next Lecture, I will remark on some of the evils with which judiciary law is really pregnant: and I will also advert (as fully as my limits will allow) to the question of codification.

These two topics, with a few others on which I must touch, will fill a long discourse. With that discourse, I shall close my disquisitions on the *sources* of law, and on the *modes* in which it begins and ends.

LECTURE XXXIX.

DISADVANTAGES OF JUDICIAL LEGISLATION.—THE QUESTION OF CODIFICATION DISCUSSED.

IN my last evening's discourse, I called your attention to a few of the numerous differences which distinguish *statute law* (or law made by direct, or proper legislation) from *judiciary law* (or law made by judicial, or improper legislation).

Having stated (or suggested) a few of those numerous differences, I passed to the advantages and disadvantages of judicial or improper legislation, and to the possibility of excluding that

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prevalent mode of legislation, by means of *complete codes*, or *complete systems of statute law*.

Adverting to the last-mentioned subject, I proposed considering the following topics in the following order: *First*, certain groundless objections which have been made to judiciary law; *secondly*, certain of the evils, which, in my opinion, judiciary law really produces; *thirdly*, the possibility of excluding judicial legislation, by means of *complete codes*, or *complete bodies of statute law*.

In pursuance of that purpose, I examined certain objections to judiciary law, which, in my opinion, are founded in misapprehension. In pursuance of the same purpose, I now shall state or suggest a few of the numerous evils which judiciary law really produces: And, having stated or suggested a few of those numerous evils, I shall give to the question of *codification* that brief and insufficient notice which is all that my time and limits will allow me to bestow upon it.

Before I proceed with the subject of judiciary law I must make a few remarks upon the term.

Note on
the terms
'judiciary
law,'
'code,'
etc.

Perhaps I ought to have called it '*judicial law*.' The epithet '*judicial*' has been applied by Sir Samuel Romilly and other eminent men, to improper or indirect legislation. And judges who legislate as *properly judging*, are styled by the same eminent persons '*judicial legislators*.'

I find, however, on looking into Bentham, that he styles the law which is made by judges, as *properly and directly exercising their judicial functions*, '*judiciary law*.' And in the language of French lawyers, the judicial decisions of judges are opposed by the name of '*arrêts judiciaires*' to their '*arrêts généraux et réglementaires*;' that is to say, to their statute laws. The difficulty of finding a term at once significant and unambiguous is extreme.

The numerous ambiguities of '*unwritten*,' I have explained in preceding Lectures.

At the end of this evening's discourse, or at the beginning of my next Lecture, I shall shew that the term '*common law*' will not answer the purpose. I will merely remark at present, that, as opposed to '*statute law*,' '*common law*' excludes statute law, but does not of necessity comprise the whole of judiciary law. As opposed, therefore, to statute law, '*common law*' is inadequate. And as opposed to the law (styled '*equity*') which is administered by the extraordinary tribunals styled '*courts of equity*,' '*common law*' is not synonymous with '*judiciary law*.'

As opposed to 'equity,' it only includes the judiciary law which is administered by the Courts styled 'Courts of Common Law;' and it comprises, moreover, the statute law administered by the same tribunals.

'Judge-made law' (as it has been applied) is also insufficient. As it has been applied, it means *any* law made by *subordinate* judges, or *judiciary* law made by *subordinate* judges. As meaning the first, it includes statute law as well as judiciary law. As meaning the second, it excludes the judiciary law which is established *directly* by the judicial decisions of *sovereign* or *supreme* judges.

We want a term for the following object: namely, law made *judicially* (or made through *particular* decisions on *particular* cases) by sovereign or subordinate judges. And I think that the term 'judicial law,' or the term 'judiciary law,' is the only term which will denote the object adequately and unambiguously.

There is the same difficulty about the word 'Code.' This word is frequently taken for a collection, not of the entire law of a country, but only of portions of it: such is Justinian's 'Codex' or Code: it is not a complete code of law, but a compilation of the constitutions of the Emperors. Justinian's Code, in the sense of a complete and exclusive body of law intended to comprise all the law thereafter to obtain in the Roman Empire, consisted of the Code, the Pandects, and likewise the Institutes, wherever that expository treatise had the force of law, as being necessary for the understanding of the Code and Pandects.

There is the same ambiguity in the German word *Gesetzbuch*. *Gesetz* is translated *statutum* or *lex*; and *Gesetzbuch* according to this analogy should mean any collection of statute law; which it accordingly does: but it also occasionally denotes a complete Code. We want a term to denote a complete body of statute law, being or intended to be the only positive law obtaining in the community. To express this, there is no term which is wholly unambiguous. The word 'Code' is that which, with these explanations, I shall find it most convenient to use.

Having made these remarks upon terms, I proceed to state or suggest a few of the numerous evils which, in my opinion, judiciary law really produces.

First: As I shewed in my last Lecture, a judiciary law (or a rule of judiciary law) exists nowhere in fixed or determinate expressions. It lies *in concreto*: Or it is implicated with the

Tenable objections to judiciary law.

First tenable objection to judiciary law.

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peculiarities of the particular case or cases by the decision or decisions whereon the law or rule was established. Before we can arrive at the rule, we must abstract the *ratio decidendi* (which really constitutes the rule) from all that is peculiar to the case through which the rule was introduced, or to the resolution of which the rule was originally applied. And in trying to arrive at the rule by this process of abstraction and induction, we must not confine our attention to the general positions or expressions which the judicial legislator actually employed. We must look at the whole case which it was his business to decide, and to the whole of the discourse by which he signified his decision. And from the whole of his discourse, combined with the whole of the case, we must extract that *ratio decidendi*, or that general principle or ground, which truly constitutes the law that the particular decision established.

But the process of abstraction and induction to which I now have alluded (and which I analysed at length in my last Lecture), is not uncommonly a delicate and difficult process ; its difficulty being proportioned to the number and the intricacy of the cases from which the rule that is sought must be abstracted and induced. Consequently, a rule of judiciary law is less accessible and knowable than a statute law : provided (that is to say) that the statute law with which the rule is compared, be not only expressed in *abstract* and *brief* expressions, but also in such expressions as are *apt* and *unambiguous* as may be. For (as I shall shew immediately) the very indeterminateness of its form (or the very indeterminateness of the signs by which it is signified or indicated) renders a judiciary law less uncertain in effect than a statute law unaptly and dubiously worded. But, assuming that a statute law is aptly and unambiguously worded (or as aptly and unambiguously worded as the subject and language will permit), it is more accessible and knowable than a rule of judiciary law which must be obtained through the process to which I have adverted above.

And it must be recollected, that whether it be performed by judges applying the rule to subsequent cases, or by private persons in the course of extra-judicial business, this delicate and difficult process is commonly performed in haste. Inso-much that judges in the exercise of their judicial functions, and private persons in their extra-judicial transactions, must often mistake the import of the rule which they are trying to ascertain and apply.

And this naturally conducts me to a *second* objection :

namely, that judiciary law (generally speaking) is not only applied in haste, but is also *made* in haste. It is made (generally speaking) in the hurry of judicial business, and not with the mature deliberation which legislation requires, and with which statute law is or might be constructed.

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objection
to judi-
ciary law.

This objection does not apply to all judiciary law; for when made on appeal, after solemn argument and deliberation, it may be made with as much care and foresight, perhaps, as any statute law. This was the case with many of the decretes of the Roman Emperors, as the supreme judicatory of the empire, which was drawn up by the *Præfectus prætorii*, commonly the most eminent lawyer in the empire, or by the eminent jurisconsults whom he consulted. The same may be the case with the law made by the Prussian Law-Commission (if this can be regarded as a court of appeal).⁷²

I would not, therefore, affirm of all judiciary law, that it is made with less deliberation than statute law; but (speaking generally) it is made in the course of business, and therefore is not constructed with the requisite forethought. The position in which judges are placed gives them ample opportunities for marking the defects of the law, and often enables them to offer to the legislator invaluable suggestions; but it does not, I conceive, render them the best of legislators, nor does it fit them pre-eminently for actual legislation: I mean, as engaged in their judicial function; for out of it they are of course the very best legislators possible, if they are enlightened as well as experienced lawyers.

Thirdly: In relation to the decided case by which the rule is introduced, a rule of judiciary law is always (strictly speaking) an *ex post facto* law. And in relation to the case to which it is first applied, it has commonly (though not universally) the effect of a law of the kind.—I think that the objection on which I now am insisting, must be taken with the slight limitation which I have just suggested, and which I will briefly explain.

A third
tenable
objection
to judi-
ciary law.

As I observed in my last Lecture, the decisions of the Courts are often anticipated by private practitioners. And the law thus anticipated, though not strictly law, performs the functions of actual law, and generally becomes such ultimately. Now where a rule of judiciary law has been thus anticipated, it may not have the effect of an *ex post facto* law with reference to the case by which it is introduced. For though the parties to the case

⁷² And with the law made by the the Privy Council according to the pre-decisions of the Judicial Committee of sent practice. See note, p. 528.—R. C.

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have not been forewarned by the legislature, they may have been forewarned by the opinion or practice of those whose opinions and practices the tribunals commonly follow. They could not have guided their conduct by the actual law, but they might have guided their conduct by what it probably would be.

The same observation applies wherever the parties can infer, by probable argumentation, the decision which the tribunals will come to. In every such case the law is strictly *ex post facto*, and the parties cannot therefore obey the law, but they nevertheless have an inkling of the rule by which their case will probably be decided.

I suggest the limitation, being unwilling to exaggerate.

The limitation, however, is so insignificant, that (speaking generally) a rule of judiciary law, with reference to the case to which it is first applied, is not only strictly an *ex post facto* law, but has all the mischievous consequences of *ex post facto* legislation.

Fourthly: For the reasons which I assigned in my last Lecture, and for others which I passed in silence, there is more of stability and coherency in judiciary law, than might, at the first blush, be imagined. But though it be never so stable and never so coherent, every system of judiciary law has all the evils of a system which is really vague and inconsistent. This arises mainly from two causes: the enormous bulk of the documents in which the law must be sought, and the difficulty of extracting the law (supposing the decisions known) from the particular decided cases in which it lies imbedded.

By consequence, a system of judiciary law (as every candid man will readily admit) is nearly unknown to the bulk of the community, although they are bound to adjust their conduct to the rules or principles of which it consists. Nay, it is known imperfectly to the mass of lawyers, and even to the most experienced of the legal profession. A man of Lord Eldon's legal learning, and of Lord Eldon's acuteness and comprehension, may know where to find the documents in which the law is preserved, and may be able to extract from the documents the rule for which he is seeking. To a man, therefore, of Lord Eldon's learning, and of Lord Eldon's acuteness, the law might really serve as a guide of conduct. But by the great body of the legal profession (when engaged in advising those who resort to them for counsel), the law (generally speaking) is divined rather than ascertained: And whoever has seen opinions even of celebrated lawyers, must know that they are often worded with a discreet and studied

A fourth
tenable
objection
to judi-
ciary law.

ambiguity, which, whilst it saves the credit of the uncertain and perplexed adviser, thickens the doubts of the party who is seeking instruction and guidance. And as to the bulk of the community—the simple-minded laity (to whom, by reason of their simplicity, the law is so benign)—they might as well be subject to the mere *arbitrium* of the tribunals, as to a system of law made by judicial decisions. A few of its rules or principles are extremely simple, and are also exemplified practically in the ordinary course of affairs: Such, for example, are the rules which relate to certain crimes, and to contracts of frequent occurrence. And of these rules or principles, the bulk of the community have some notion. But those portions of the law which are somewhat complex, and are not daily and hourly exemplified in practice, are by the mass of the community utterly unknown, and are by the mass of the community utterly unknowable. Of those, for example, who marry, or of those who purchase land, not one in a hundred (I will venture to affirm) has a distinct notion of the consequences which the law annexes to the transaction.

Consequently, Although judiciary law be really certain and coherent, it has all the mischievous effect (in regard to the bulk of the community) of *ex post facto* legislation. Unable to obtain professional advice, or unable to obtain advice which is sound and safe, men enter into transactions of which they know not the consequences, and then (to their surprise and dismay) find themselves saddled with duties which they never contemplated.

The ordinary course is this: A man enters into some transaction (say, for example, a contract) either without advice, or with the advice of an incompetent attorney.

By consequence, he gets into a scrape.

Finding himself in a scrape, he submits a case, through his attorney, to counsel.

And, for the fee to attorney and counsel, he has the exquisite satisfaction of learning with certainty that the mischief is irremediable.

I am far from thinking, that the law can ever be so condensed and simplified, that any considerable portion of the community may know the whole or much of it.

But I think that it may be so condensed and simplified that *lawyers* may know it: And that, at a moderate expense, the rest of the community may learn from lawyers beforehand the legal effect of transactions in which they are about to engage.

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This expectation appears to me not to be romantic or extravagant, and my view of the possibility of simplifying the law extends so far: anything further certainly appears to me to be visionary. It would, indeed, as I shall shew in treating of the *rationale* of the distinction between the law of things and the law of persons, be practicable to break down the law into commodious parts, such that each class of persons might know something of that part of the law which peculiarly regards themselves. And the legislator might also construct technical formulæ for different legal transactions, with proper instructions in the margin, which would enable persons to engage in such transactions with much greater safety than at present.

v. v. Mischief done to the cause of codification, by overstating the degree of simplicity which can be given to the law.

Inconsistency of Bentham and others in this respect. When speaking of law in general, they insist on the simplicity and brevity which may be given to the system: When descending to its particular parts, they insist on its complexity.

The evil upon which I am insisting, is certainly not *peculiar* to judiciary law. Statute law badly expressed, and made bit by bit, may be just as bulky and just as inaccessible as law of the opposite kind. But there is this essential difference between the kinds of law. The evil is inherent in judiciary law, although it be as well constructed as judiciary law can be. But statute law (though it often is bulky and obscure) *may be* compact and perspicuous, if constructed with care and skill. There is in this respect an essential difference between statute and judiciary law.

An evil
not in-
herent in
judiciary
law.

An objection is sometimes made to judiciary law, which is founded on an accident rather than inherent in its nature: that it is not attested by authoritative documents, but resides in the memory of the judges, or is attested by the disputable records of private reporters. This, however, is the effect of the legislators' negligence. It is clear that there *might* be authorised reporters, and that their reports might be made official evidence. The decisions of our courts, as recorded in the year books, were formerly official and authoritative evidence. And it was proposed by Lord Bacon to James the First, that this ancient practice should be renewed.⁷³ On the other hand, statute law itself is not necessarily written, any more than that it is necessarily promulged.

⁷³ See *ante*, p. 528.

In some of the smaller States of Germany, the decisions of the Courts are not recorded and promulgated, even by private reporters, in consequence of the smallness of the State, and the small quantity of business, which is not sufficient to pay a reporter. In these States the law must be utterly unknown! There is scarcely anything which can properly be called law. It precariously resides in the memory of the judge or of the officials of the Court. According to Thibaut,⁷⁴ there is not one lawyer in those States who has any idea what the law is, or possesses any considerable portion of the documents from which it is to be gathered. There is an approximation to this in certain cases in our own country: in local Courts, for instance, such as that of the Duchy of Lancaster. The peculiar law administered by these Courts dwells entirely in the memory of the registrar; that is, it exists somewhere, but is entirely what he chooses to make it in the particular case. And every one who frequents our Courts must have seen that occasionally, when the judge is at a standstill, he stoops down and whispers to the registrar of the Court, in whose *Bewusstseyn*, or consciousness, that portion of the law of the Court does really reside.

Fifthly: I am not aware that there is any *test* by which the validity of a rule made judicially can be ascertained.

A fifth
tenable
objection
to judi-
ciary law.

Is it the *number* of decisions in which a rule has been followed, that makes it law binding on future judges? or is it the *elegantia* of the rule (to borrow the language of the Roman lawyers), or its consistency and harmony with the bulk of the legal system? Or is it the *reputation* of the judge or judges by whom the case or cases introducing the rule were decided?

In the Roman law, the operation of judicial decisions, in the way of establishing law, is styled (as I have stated before) '*auctoritas rerum perpetuo similiter judicatarum.*' And, looking at the form of the expression, we might infer that a rule is not binding, unless it has been applied to the decision of *many* resembling cases, or, at least, of more cases than one. But, this notwithstanding, there are many rules of law in the Roman system which rest on a single decision of a single tribunal.⁷⁵

In fine, we can never be absolutely certain (so far as I know) that any judiciary rule is good or valid law, and will certainly be followed by future judges in cases resembling the cases by which it has been introduced.

⁷⁴ 'Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland' (in the 'Civilistische Abhandlungen,' and also printed sepa-

rately, Heidelberg, 4th edit.). This is the book to which Savigny's 'Vom Beruf,' etc., was an answer.

⁷⁵ Falck, § 10, note (12).

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Here then is a cause of uncertainty which seems to be of the essence of *judiciary* law. For I am not aware of any contrivance by which the inconvenience could be obviated.

It is manifestly *not* of the essence of *statute* law. For assuming that statute law is well constructed, and is also approved of by the bulk of the community, it is absolutely certain until it is repealed.

If, indeed, it be obscure, or if it be generally disliked, it is not more certain than judiciary law. If it be obscure, it is not knowable. And if it be generally disliked, although it be perfectly perspicuous, it probably will be abrogated by the tribunals at the instance of public opinion. A curious case of this has been mentioned to me by Colonel Murat,⁷⁶ son of the late King of Naples, who, curiously enough, has practised as an English barrister in the Floridas, and seems to have a very pretty knowledge of English law. He says that the Acts of the American State legislatures, or at least the Acts of the legislatures of those States in which he has resided, are habitually overruled by the judges and the bar. At the beginning of every term they meet and settle what of the Acts of the preceding session of the legislature they will abide by; and such is the general conviction of the incapacity of the State legislature, and of the comparative capacity and the experience of the judges and the bar, that the public habitually acquiesce in this proceeding. Accordingly, if a law, which the profession have agreed not to obey, is cited in judicial proceedings, it is absolutely rejected and put down by the lawyers *sans cérémonie*. In such a case as this it is evident that the statute law is not certainly law, unless it chime in with the opinion of the judges and of the bar.

I have used the word *induction* to denote the process of collecting a rule of judiciary law from a case or cases. It has been suggested to me that the word induction will hardly do when the rule is abstracted from a single case; but I conceive that the term may properly be applied even then. I apprehend

⁷⁶ It may not be impertinent to say, It was strange to hear the technical language of English law familiarly used by a man whose features reminded one at every moment of his origin, and of the widely different destiny which had seemed to await him. M. Murat afterwards wrote a book in which the institution of slavery was represented as indispensable to the highest forms of civilisation. He died some years ago. —S. A.

that the 'Murat' here alluded to is Achilles Murat, the eldest son of the somewhere King of Naples. After the fall of Bonaparte he settled in America, where he married a grandniece of Washington and became a practising advocate at the American bar. In 1831 he and his wife resided for some time in England and frequently visited us. The conversation between Mr. Austin and M. Murat almost always turned on law.

that in physical science a single experiment conducted with accuracy is deemed a good basis for a universal or general conclusion, and is properly called induction.

I have also called the operation of which I am speaking a *peculiar process* of induction, to distinguish it from the interpretation of statute law; since this also comes under the general word induction. It is extremely difficult to find suitable terms for distinguishing ideas so closely related, though requiring to be carefully discriminated.

Sixthly: In consequence of the implication of the *ratio decidendi* with the peculiarities of the decided case, the rule established by the decision (or the *ratio*, or the general principle of the decision) is never or rarely comprehensive.⁷⁷ It is almost necessarily confined to such future cases as closely resemble the case actually decided: although other cases, more remotely resembling, may need the care of the legislator. In other words, the rule is necessarily limited to a narrow *species* or sort, although the *genus* or kind, which includes that *species* or sort, ought to be provided for at the same time by one comprehensive law.

A sixth
tenable
objection
to judi-
ciary law.

This is excellently explained by Sir Samuel Romilly, in that admirable article on Codification which I ventured to criticise in my last evening's discourse.

The passage is as follows:

'Not only is the Judge, who, at the very moment when he is making law, is bound to profess that it is his province only to declare it; not only is he thus confined to technical doctrines and to artificial reasoning,—he is further compelled to take the narrowest view possible of every subject on which he legislates. *The law he makes is necessarily restricted to the particular case which gives occasion for its promulgation.* Often when he is providing for that particular case, or, according to the fiction of our Constitution, is declaring how the ancient and long-forgotten law has provided for it, he represents to himself other cases which probably may arise, though there is no record of their ever having yet occurred, which will as urgently call for a remedy, as that which it is his duty to decide. It would be a prudent part to provide, by one comprehensive rule, as well for these possible events, as for the actual case that is in dispute, and, while terminating the existing litigation, to obviate and prevent all future contests. This, however, is, to the judicial

⁷⁷ Extension or restriction of the *ratio decidendi* is possible (but must not be confounded with an extension or restriction of the decision itself): or, rather, *ratio* being expressed by its introducer inadequately, may be extended or restricted (in expression and application) by subsequent judges.

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legislator, strictly forbidden ; and if, in illustrating the grounds of his judgment, he adverts to other and analogous cases, and presumes to anticipate how they should be decided, he is considered as exceeding his province ; and the opinions thus delivered, are treated by succeeding judges as extra-judicial, and as entitled to no authority.' ⁷⁸

An example is afforded by the decision of Lord Kenyon, in the case of *Read and Brookman*,⁷⁹ to which I have already alluded. The case arose on the proof of a lost bond, and Lord Kenyon decided that the profert of the bond might be dispensed with. Had he said that it might be dispensed with in the case of a lost *instrument* of any kind, he would probably have been held to have departed out of the case before him ; it would have been said that he had taken into his decision objects to which the immediate case had no reference, and that he ought to have confined himself to a *bond*. His decision, so far as it extended beyond this, would not have obtained as authority. Thus the exigencies of society are provided for bit by bit, in the slowest and most inefficient manner, and the documents containing the law are swelled to an immense volume. In lieu of one comprehensive rule determining a *genus* of cases, there are many several and narrow rules severally and successively determining the various species which that *genus* includes.

And this inconvenience (for a reason which I have noticed above) is probably of the essence of judiciary law. So delicate and difficult is the task of legislation, that any comprehensive rule, made in haste, and under a pressure of business, would probably be ill adapted to meet the contemplated purpose. It is certain that the most experienced and the most learned and able of our judges, have commonly abstained the most scrupulously from throwing out general propositions which were not as proximate as possible to the case awaiting solution : Though (for the reasons which I stated in my last Lecture, and to which I shall revert immediately) the *ratio decidendi* (or ground or *principle* of decision) is necessarily a general position applying to a class of cases, and does not concern exclusively the particular case in question. I have heard Lord Eldon declare (more than once) that nothing should provoke him to decide more than the decision of the case in question absolutely required.

[Conversely, the reason may be too large. And hence the necessity of narrowing it by distinctions.]

⁷⁸ Edinburgh Review, vol. xxix. p. 331.

⁷⁹ 3 T. R. 151.

Seventhly: wherever much of the law is judiciary law, the statute law which co-exists with it, is imperfect, unsystematic, and bulky.

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A seventh
tenable
objection
to judi-
ciary law.

For the judiciary law is, as it were, the *nucleus* around which the statute law is formed. The judiciary law contains the *legal dictionary*, or the definitions and expositions (in so far as such exist) of the leading technical terms of the entire legal system. The statute law is not a whole of itself, but is formed or fashioned on the judiciary law, and tacitly refers throughout to those leading terms and principles which are expounded by the judiciary.—And hence, as I shall shew immediately, arises the greatest difficulty in the way of codification. For, in order to the exclusion of the judiciary law, and to the making of the code a complete body of law, the terms and principles of the judiciary must not be assumed tacitly, but must be defined and expounded by the code itself: A process which people may think an easy one—until they come to *try* it.

Wherever, therefore, much of the law consists of judiciary law, the statute law is not of itself complete, but is merely a partial and irregular supplement to that judiciary law which is the mass and bulk of the system. The statute law is not of itself an edifice, but is merely a set of irregular or unsystematic patches stuck from time to time upon the edifice reared by judges.

It is true that a body of statute law (though it be not stuck patchwise on a groundwork of judiciary law) may be irregular and bulky.

This is actually the case with that portion of the Prussian Law which has been made from time to time for the purpose of amending the Code. This is done by the Prussian Law Commission, by virtue of a provision that when the Courts are in doubt, they shall refer the case to the Commission, who solve the question of law, but leave untouched the decision of the last Court of Appeal on the particular case.⁸⁰ Now the amount of the declaratory laws made by this Commission is already many times the bulk of the Code which they are intended to explain. This, however, arises mainly from the original bad construction of the Prussian Code, and the neglect of the Government in not remodelling the Code from time to time, and inserting the amendments which have been suggested by experience.

⁸⁰ See Savigny, Vom Beruf, etc., p. 89.

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The evil therefore is not of the essence of statute law, though the bulk of the latter is often in point of fact as formidable as that of judiciary law.

And there is this essential difference between a complete body of statute law, and a body of statute law stuck patchwise on a groundwork of judiciary law. The latter *must* be irregular; *must* be bulky; and therefore *must* be difficult of access. The latter *may* be systematic; *may* be compact; and therefore *may* be (in the language of Mr. Bentham) *cognoscible*.

Wherever, therefore, much of the law consists of judiciary law, the entire legal system, or the entire *corpus juris*, is necessarily a monstrous chaos: [partly consisting of *judiciary* law, introduced bit by bit, and imbedded in a measureless heap of particular judicial decisions, and partly of legislative law stuck by patches on the judiciary law, and imbedded in a measureless heap of occasional and supplemental statutes.

Introduc-
tion to
question
of codifica-
tion.

Since such are the monstrous evils of judicial legislation, it would seem that the expediency of a *Code* (or of a complete or exclusive body of statute law) will hardly admit of a doubt. Nor would it, provided that the chaos of judiciary law, and of the statute law stuck patchwise on the judiciary, could be superseded by a *good* code. For when we contrast the chaos with a positive code, we must not contrast it with the very best of possible or conceivable Codes, but with the Code, which, under the given circumstances of the given community, would probably be the result of an attempt to codify.

Whoever has considered the difficulty of making a good statute, will not think lightly of the difficulty of making a Code.

To conceive distinctly the general purpose of a statute, to conceive distinctly the subordinate provisions through which its general purpose must be accomplished, and to express that general purpose and those subordinate provisions in perfectly adequate and not ambiguous language, is a business of extreme delicacy, and of extreme difficulty, though it is frequently tossed by legislators to inferior and incompetent workmen. I will venture to affirm, that what is commonly called the *technical* part of legislation, is incomparably more difficult than what may be styled the *ethical*. In other words, it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the lawgiver.

Accordingly, statutes made with great deliberation, and by learned and judicious lawyers, have been expressed so obscurely,

or have been constructed so unaptly, that decisions interpreting the sense of their provisions, or supplying and correcting their provisions *ex ratione legis*, have been of necessity heaped upon them by the Courts of Justice. Such, for example, is the case with the Statute of Frauds; which was made by three of the wisest lawyers in the reign of Charles the Second: Sir M. Hale (if I remember aright) being one of them.

And here I may remark, that, unless a statute be well made, it commonly is more uncertain than a rule of judiciary law.

In performing the process of induction (described in my last Lecture) by which a judiciary rule is extracted from a particular decision, the interpreting judge is not tied to the expressions which his legislating predecessor has actually employed. He may collect the *ratio decidendi* (or the general ground or principle which constitutes the rule that is sought) from any *indicia* whatever which the case or its circumstances may afford.

But a judge who interprets or construes (in the proper sense of the word) a provision of a statute law, is tied to the very expressions in which the provision is given. And looking at those very expressions, and at the design of the provision and the statute, he may find it impossible to determine with certainty the import of the provision. For the expressions in which it is conceived may seem to say one thing, whilst the particular scope of the provision, or the predominant design of the statute, may indicate a different meaning. Now if he might gather the meaning from any *indicia* (like the judge who extracts a rule from a judicial decision) he would find no difficulty. He would resort at once to the design of the provision, or the design of the whole statute, and put upon the terms of the provision such a construction as would make the legislator consistent with himself. But being obliged to attend partly to the probable grammatical meaning of the very terms, he can hardly decide with a perfect assurance that he is construing the statute correctly.

Its very want of a precise form renders a judicial rule (in spite of its inherent uncertainty) less uncertain than a badly constructed statute.

It is hardly necessary to add, that I limit the remark to a badly constructed statute. For no judicious or candid man will doubt or dispute for a moment, that a well-made statute is incomparably superior to a rule of judiciary law.

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It follows from what I have premised, and will appear clearly from the remainder of my discourse, that the question of codification is a question of time and place. Speaking in abstract (or without reference to the circumstances of a given community) there can be no doubt that a complete code is better than a body of judiciary law: or is better than a body of law partly consisting of judiciary law, and partly of statute law stuck patchwise on a body of judiciary.

But taking the question in concrete (or with a view to the expediency of codification in this or that community) a doubt may arise. For here we must contrast the existing law (not with the *beau idéal* of possible codes, but) with that particular code which an attempt to codify would then and there engender. And that particular and practical question (as Savigny has rightly judged) will turn mainly on the answer that must be given to another: namely, Are there men, then and there, competent to the difficult task of successful codification? of producing a code, which, on the whole, would more than compensate the evil that must necessarily attend the change? The vast difficulty of successful codification, no rational advocate of codification will deny or doubt. Its impossibility, none of its rational opponents will venture to affirm.

Before I proceed to the question, I beg leave to explain a remark which I made last evening.—When I said that the question of codification lay in a narrow compass, I meant, that little could be said *pertinently* about the question *in abstract*. The question in concrete (or with reference to a given community at a given time) involves, of course, a considerable number of particular considerations: considerations, however, which fall not within my design, and to which, therefore, I did not advert. And in order to shew the little which can be said about the question in abstract, it is necessary to shew the impertinence of almost all the arguments which have been adduced by the advocates on each of the two sides. To strip the question of those impertinent arguments, and to shew how little can be said about it in a pertinent manner, is therefore a task of considerable length, although the pertinent considerations occupy a narrow space.

In my opinion, a mere statement of the evils inherent in judiciary law, is amply sufficient to demonstrate (considering the question in abstract) that codification is expedient.

I have above enumerated the principal evils inherent in a

body of judiciary law, or in a body composed of judiciary law and statutes supplementary to it; that is to say, of law uncodified. Any direct proof other than this of the expediency of codification is superfluous.

In considering, therefore, the question of codification (to which I now proceed), I shall merely shew the futility of the leading or principal arguments which are advanced against codification considered generally or in abstract. A consideration of its expediency here or there, would involve particular considerations beside the scope of my Course, and surpassing the space and time which I can afford to assign to the subject.

Before I advert to those arguments, I would briefly interpose the following remarks:—

In speaking of the advantages and disadvantages of statute and judiciary law I advert to the form and not to the matter. It is clear that these considerations are completely distinct. It is clear that judiciary law of which the purposes are beneficent, may produce all the evils on which I have insisted. It is clear that statute law, well arranged and expressed, may aim at pernicious ends.

In like manner, codification does not involve any innovation on the *matter* of the existing law. It is clear that the Law of England might change its shape completely, although the rights and duties which it confers and imposes remained substantially the same. In treating of codification, I consider law from its merely technical side, or with a view to the consequences, good or evil, of arrangement and expression.

These distinct ideas are often confounded. The opponents of codification often suppose it to mean an entire change of all the law obtaining in the country.

The first and most current objection to codification, is the necessary incompleteness of a code. It is said that the individual cases which may arise in fact or practice, are infinite; and that, therefore, they cannot be anticipated, and provided for, by a body of general rules. The objection (as applied to statute law generally) is thus put by Lord Mansfield in the case of *Omychund and Barker*. [He was then Solicitor-General.] ‘Cases of law depend upon occasions which give rise to them. All occasions do not arise at once. A statute very seldom can take in all cases. Therefore the common law that works itself pure by rules drawn from the fountains of justice, is superior to an act of parliament.’

First leading objection to codification.

My answer to this objection is, that it is equally applicable

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to all law: and that it implies in the partisans of judiciary law (who are pleased to insist upon it), a profound ignorance, or a complete forgetfulness, of the nature of the law which is established by judicial decisions.

Judiciary law consists of *rules*, or it is merely a heap of particular decisions inapplicable to the solution of future cases. On the last supposition, it is not law at all: And the judges who apply decided cases to the resolution of other cases, are not resolving the latter by any determinate law, but are deciding them arbitrarily.

The truth, however, is, as I shewed in my last Lecture, that the general grounds or principles of judicial decisions are as completely Law as statute law itself, though they differ considerably from statutes in the manner and form of expression. And being law, it is clear that they are liable to the very imperfection which is objected to statute law. Be the law statute or judiciary, it cannot anticipate all the cases which may possibly arise in practice.

The objection implies, that all judicial decisions which are not applications of statutes are merely arbitrary. It therefore involves a double mistake. It mistakes the nature of judiciary law, and it confounds law with the *arbitrium* of the judge. Deciding arbitrarily, the judge no doubt may provide for all possible cases. But whether providing for them thus be providing for them by law, I leave it to the judicious to consider.

Yet this objection is insisted on by many of the redactors of the French Code, whom one might almost suppose to be enemies of codification, and desirous to defeat the purpose of the code which they were appointed to make. In the *Conférences du Code Napoléon*, a work containing a report of the discussions in the Council of State upon the original project of the code, Portalis says that a code can provide only very imperfectly for the variety of cases which arise, and that much must be left to *le bon sens* and *l'équité*. Now if *le bon sens* and *l'équité*, that is, the *arbitrium* of the judge, are to decide, I cannot see the use of all the pother about legislation. So far as the judge's *arbitrium* extends, there is no law at all.

If law, as reduced into a code, would be incomplete, so is it incomplete as not so reduced. For codification is the re-expression of existing law. It is true, that the code might be incomplete, owing to an oversight of redactors. But this is an objection to codification *in particular*.

Hugo's objection⁸¹ proceeds on the mistake of supposing that a Code must provide for every possible concrete case. But this (as I have shewn already) is what no law (statute or written) can possibly accomplish. It would be endless.

His objection is, that if a body of law affected to provide for every possible question, its provisions would be so numerous that no judge could embrace them: And as to the cases which it left undecided (which would necessarily be numerous) the conflicting analogies presented by those cases would be in exact proportion to the number and minuteness of its provisions.

As to the first part of the objection, it is necessary to provide *a priori* for cases to arise in future, or to leave such cases to the mere *arbitrium* of the judge. And I would submit, that you do not obviate the incompleteness inherent in statute law by making *no law*.

The second part of the objection is founded on the supposition that the provisions of a code are more minute and numerous than the rules embraced by a system of judiciary law: that the more minute and numerous the rules, the more likely it is that they will conflict; and that, in trying to apply the law to a given case, a conflict of opposite rules will arise.

Now it seems to me that this is the reverse of the truth.

As I have shewn above, a rule made by judicial decision is almost necessarily narrow: whilst statute laws may be made comprehensively, and may embrace a whole genus of cases, instead of embracing only one of the species which it contains.

And which, I would ask, is the most likely to be bulky and inconsistent: A system of rules formed together, and made on a comprehensive survey of the whole field of law? or a *congeries* of decisions made one at a time, and in the hurry of judicial business?

Repetition and inconsistency are far more likely where rules are formed one by one (and, perhaps, without concert by many

⁸¹ Hugo's objection, as cited by Savigny, is as follows: 'Wenn alle Rechtsfragen von oben herab entschieden werden sollten, so würde es solcher Entscheidungen so viele geben, dass es kaum möglich wäre, sie alle zu kennen; und für die unentchiedenen Fälle, deren noch immer genug übrig blieben, gäbe es nur um so mehr widersprechende Analogien.'

Which is the most likely to abound with 'competing analogies'? A *system* of decisions formed at once, and resting upon a comprehensive survey of the

whole field of law? or a *congeries* of decisions made one at a time, and in the hurry of judicial business? And observe, this last objection applies to *customary* as well as to (strictly so called) *jurisprudential* or *judicial* law; for though custom may exist independently of decisions, it only becomes *law* in so far as it is recognised by the tribunals. And observe further, that all the objections which may be urged against codification, apply in a higher degree to private and unauthorised exposition.—*Marginal Note, Vom Beruf, &c., p. 5*

distinct tribunals), than where all are made at once by a single individual or body, who are trying to embrace the whole field of law, and so to construct every rule as that it may harmonise with the rest.

And here I would make a remark which the objection in question suggests, and which, to my understanding, is quite conclusive.

Rules of judiciary law are not decided cases, but the *general* grounds or principles (or the *rationes decidendi*) whereon the cases are decided. Now, by the practical admission of those who apply these grounds or principles, they may be codified, or turned into statute laws. For what is that process of induction by which the principle is gathered before it is applied, but this very process of codifying such principles, performed on a particular occasion, and performed on a small scale? If it be possible to extract from a case, or from a few cases, the *ratio decidendi*, or general principle of decision, it is possible to extract from all decided cases their respective grounds of decisions, and to turn them into a body of law, abstract in its form, and therefore compact and accessible.

Assuming that judiciary law is really law, it clearly may be codified.

Reverting to the objection, I admit that no code can be complete or perfect. But it may be less incomplete than judge-made law, and (if well constructed) free from the great defects which I have pointed out in the latter. It may be brief, compact, systematic, and therefore knowable as far as it goes. And many devices may be hit upon, which have never yet been thought of, or which have been neglected, for removing the defects incident to codes.⁸² That the defects of the French and Prussian codes, in the original conception and construction, render them necessarily imperfect and no fair sample of possible codes, will be seen in the sequel.

A second objection to codification is founded on the alleged ill success of the so-called codes which have been compiled in France, Prussia, and other countries, by order of the government, and established as law by its authority. I now proceed to consider this objection, and shall afterwards note various objections which have been made to codification by Savigny, in his

Second objection to codification—failure of the French and Prussian codes—examined.

⁸² Amongst such devices may be instanced the method adopted by the compilers of a code for India, instalments of which have been made and published under the authority of Her Majesty's Commissioners; a method, combining concise statement of principles with illustration by practical examples.—R. C.

specious but hollow treatise on that subject.⁸³ The professed purpose of the treatise is not to deny the expediency of codification generally, but to shew its inexpediency in Germany at the present time. In so far as his arguments apply to the professed and proper purpose of his work, I have no concern with it; for the advantages or disadvantages of codification in the abstract, are the subjects to which I confine myself. But his arguments are often aimed directly, and oftener obliquely, against codification in general; and so far as they are so, they fall within my scope. In the course of his book he adverts to the objection which I first mentioned, that which is founded upon the necessary incompleteness of a code, and also to the second, the ill success of the codes which have been already established. I shall, therefore, in considering this objection, occasionally advert to Savigny's book; reserving the special examination of it for the latter portion of the present Lecture.

With respect, then, to the alleged ill success of the codes already established, it must be admitted that they have not accomplished the primary ends of a code in the modern sense of the term, that is, a complete body of law intended to supersede all the other law obtaining in the country. In France and Prussia, to the codes of which countries I shall confine my remarks, the law does not possess that compactness and accessibility, which are the main ends of codes as such; for the matter and substance of the law must be excluded from consideration, as things with which the question of codification has little connection.

In France, the code is buried under a heap of subsequent enactments of the legislature, and of judiciary law subsequently introduced by the tribunals. In Prussia, the mass of new laws and authoritative interpretations which have been introduced subsequently by the promulgation of the code, fills, I believe, about thirty quarto volumes, the code itself consisting of eight or ten.

And here I may remark that the so-called Prussian code was not intended by its author, the great Frederic, or by the persons whom he employed to draw it up, as a code in the modern acceptation, that is, a complete body of law. In most of the German States before the introduction of codes, the state of the law was as follows:—they were partly governed by their own local laws, and partly by what was called *Gemeines Recht*;

⁸³ Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft. Heidelberg, 1814.

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or common law of Germany, consisting in part of the Roman and the Canon law, in part of rules of domestic or strictly German growth, which were got at by comparing the different local systems in the way of abstraction and induction. This common law was resorted to in cases for which the local laws or customs of the different States did not afford a solution. Now the Prussian code was not intended to codify all the law obtaining in Prussia, but only this subsidiary common law; leaving the codification of the different laws obtaining in particular parts of the Prussian dominions to a future opportunity. This was all that it intended, and this is all that it has performed. And although the code has now been in force for nearly half a century, none of the local laws of any districts of the Prussian dominions have yet been codified, except those obtaining in a very small part of that kingdom, the district called East Prussia.

I may also observe that, by virtue of a provision of the code, *præjudicia* or precedents have no authority. The Courts are expressly forbidden to guide their decisions by the decisions of their predecessors. Consequently, although the code is overwhelmed by a quantity of explanation, no judiciary law, properly so-called, has been stuck upon it. As I have mentioned more than once, all doubtful points of law are referred to a Law Commission, who emit a declaratory law on the occasion of every case so submitted to them. The thirty volumes or thereabouts of supplementary law which I have already mentioned are, in consequence, not decisions on the code, but acts of authoritative interpretation, issued immediately by the government. This at least is the theory of the Prussian system. In practice I believe that *præjudicia* or decided cases do influence the decisions of the Courts. For it is certain that reports of decided cases are published regularly at Berlin; and I can conceive no motive for publishing them if they were not cited in the Courts, and did not influence the judgments of the Courts. They probably have an influence similar to that which the decisions of the English Courts are known to have in the United States. It cannot be said that the decisions of the Court of King's Bench have authority in New York, but they do in fact influence the conduct of the American tribunals. The treatises of reputation which appear in this country on the law, are frequently republished in the United States, with notes by American lawyers. I have myself seen a copy of an American edition of Sugden on the Law of Vendors and Purchasers.

To return to my more immediate subject. The ill success

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These codes have failed, not as codes, but by reason of their faulty construction.

of particular codes, admitting their failure to be as complete as is affirmed, would prove nothing against codification. Those who would make it tell as an objection to codes in general, must shew that the particular codes in question have failed as being codes, or by virtue of the qualities belonging to them as codes, not by defects peculiar to the codes in question; defects merely accidental, which care and skill might have obviated. This self-evident truth the objectors to codification never saw, or disingenuously passed over. They first boldly affirm, contrary to the fact, that the French and Prussian codes have completely failed, and then infer from the failure, that successful codification is universally impracticable. They first misstate or distort and exaggerate the fact; and then, on the fact so misstated or exaggerated, they found a sophistical inference.

The inconsistency of Savigny is here remarkable; for he himself in the very work in which he urges the failure of the French and Prussian codes as an argument against codification, points out defects both in the conception and in the construction of those codes, which, on his own shewing, were anything but inevitable. He treats the authors of the French code with merited severity for their gross incompetency to their task, yet he brings forward the defects in their workmanship as a reason against codification in Germany, and against codification in general. He in fact argues thus: Here is a code swarming with defects which were anything but unavoidable; defects so gross and flagrant, that the authors richly merit the critical lash which I am now mercilessly laying on them: *ergo* codes and codification are manifestly naught.

To shew that the objection is untenable, I shall advert to various accidental circumstances which are quite sufficient to account for the imperfections of the French code, and to prove that the objection is the merest sophistry; I shall mainly confine my observations to the French code, because its failure is the most remarkable, and because it is the best known, or the only one which is known, to English lawyers. Some of its faults are mentioned by Savigny; others, which are more important, he has not mentioned.

The first glaring deficiency of the French code is the total want of definitions of its technical terms, and explanations of the leading principles and distinctions upon which it is founded. This grievous defect Savigny has not mentioned. Without definitions of the technical terms and explanations of the leading principles and distinctions, the particular provisions of the code

First defect in the French code: it is totally devoid of definitions of the . . .

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terms, and
explanations
of the leading
principles of
the French
law.

must be defective and incoherent, and its language dubious. For, unless these leading principles are habitually present to the minds of the authors, how are they to thread with certainty the labyrinth of the details? How can they follow the principles to all their consequences? Unless the technical terms are employed everywhere precisely in the same meanings, how are they to express themselves without ambiguity? But unless the leading principles and distinctions are defined, how are those leading principles and distinctions to be constantly present to the minds of the codifiers in a definite shape? and unless the technical terms are defined, how are those terms to be uniformly employed in the same meanings? Again, unless both sets of definitions are contained in the code itself, the judges and all other persons who have occasion to apply it, must be perpetually at a loss for the meaning. Although a code may be constructed with consummate care and skill, none of its detailed provisions can ever be complete in itself: unless viewed in conjunction with the other details and with the leading principles, a particular provision can have no complete meaning. Unless, therefore, the code contains a statement of leading principles as well as details, the code itself does not furnish the necessary guides to its own meaning; if those guides exist at all, they exist *en dehors* of the code.

Now, of the necessity of explanations of the leading principles and distinctions and of definitions of the technical terms, the compilers of the French code had no idea. The principles and distinctions they tacitly borrowed from the ancient law, and clothed them in the technical terms of the same law, without any attention to determining the meaning of those terms, under a tacit assumption that it is known and certain. Moreover, the French code is not a body of law, or is not a body of law forming a substantive whole. It is nothing but a loose abstract of the former law, or an index to a body of law existing *dehors* itself. This very defect in the French code is one principal cause of the fallacious brevity which its injudicious admirers have frequently selected as matter of praise; forgetting that the brevity which arises from incompleteness, in the end leads to unnecessary bulk from the mass of supplemental statutes and decisions which it of necessity gives rise to. The code is consequently defective and incoherent, and is often expressed dubiously: and in order to correct its defects and incoherences and to explain its meaning, the old law to which it constantly refers has been let in by the Courts upon it; and an immense

body of *jurisprudence* (in the French sense of the term) introduced by the tribunals, obtains as law by the side of it. From the original defect in the conception of the code, this was a necessary consequence: but it might manifestly have been obviated.

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The Prussian code has the same vice. Being based on the Roman law, it refers throughout to the principles and distinctions of the Roman law, and borrows the technical language of that system, without the requisite explanation of the import of that language. A knowledge of the Roman law, and of the other systems of law previously obtaining in Germany, is still a necessary preliminary to a study of the code. The code has not superseded completely the old subsidiary or common law which it was intended to supplant.

So the
Prussian
code.

It is remarkable that the authors of Justinian's compilations, in spite of their general incompetency, had some notion of the necessity of explaining in the code itself, its leading principles and distinctions, and defining its technical terms. The compilers of the French code seem to have had no such idea at all. Justinian, if we judge from the prefaces to his compilations, intended those works to supersede the law of which they were bungling abridgments; and he accordingly forbids the judges thereafter to resort to the old law or to the old law authorities. To render needless this recourse, he has hit upon two devices. The first of these is an attempt, though executed very imperfectly, to insert definitions of certain leading terms: the last title but one of the Pandects is *de verborum significatione*. The second is an attempt to define certain of the legal rules (*regulæ juris*) which run through the whole law. Another means was also taken to render reference to the previous law unnecessary: this was the insertion in the Pandects, and in various places in the code, of much historical matter; much similar matter is also left in the excerpts, for the clearer understanding of those excerpts. This historical matter is unskilfully inserted, and has often been confounded by modern commentators with the imperative part of the law; whereby they have been led to imagine the Pandects to be more inconsistent than they really are; fancying they found antinomies where they are indeed two contradictory laws, but where one only is inserted as law; the other is only referred to as an historical fact in order to explain something else.

It may be said, that it is impossible to give in the code itself explanations of the leading principles and distinctions, and

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definitions of the technical terms. My answer is, that it is undoubtedly difficult, but it cannot be impossible; for the principles and distinctions must exist somewhere: and the terms must have a determinate meaning, which it must be possible to find: and though the principles and distinctions and the meanings of the terms may be imbedded in much other matter, they may be extracted and put into an abstract shape.

Failure of
the Prussian
and French
codes
grossly exaggerated.

After all, the alleged ill success of the French and Prussian codes is greatly exaggerated. They at least give a compendious, though a defective, view of the old law; they have cleared it of a load of inconsistencies and much reduced its bulk, though they have not superseded it completely. If any Frenchman or German of the requisite knowledge is asked whether the code, even as it is, be preferable or not to the law in its previous state, he does not hesitate to say that it is greatly preferable, and that the quantity of litigation arising from doubt as to the law is very greatly diminished. I know this to be the opinion of several Frenchmen who are in every respect competent witnesses, and I never met with any German practitioner who did not laugh at the objections made to codification by the professors in the Universities. The truth is that in Germany the enemies of codification are not the practising lawyers, but (what one would not have expected) the theorists: chiefly the professors of the Roman, the Canon, and the old German law: partly no doubt from attachment to the systems of law with which they are conversant, partly from fear lest the demand for a knowledge of that old law might be superseded, if codes were introduced: a fear, I believe, wholly unfounded as far as regards the Roman law, and the history of German law. It is obvious that no instructed body of lawyers will ever confine themselves to the study of a code, how perfect soever it may be. Unless the history and philosophy of law were well understood, no good code could possibly be constructed: and unless those branches of knowledge continued to be studied, a good code, even when constructed, would infallibly deteriorate.

The
French
code never
intended
by its
authors
to be a
code, properly
so called—that is, to
supersede

Another defect of the French code is pointed out by Savigny. It appears from the *Conférences* or discussions in the Council of State upon the project of the Code, that it was not the design of the compilers to make it a code in the modern sense of the term, that is, a complete body of statute law. In those discussions they refer perpetually to various *subsidia* with which it is to be eked out. Of these *subsidia*, as of the work itself which they were engaged in, they had no definite notion: but in the

main they intended that where the code should not be found sufficient, the Courts should decide by what they called *usage* and *doctrine*: that is, the customary law previously obtaining within the resort of the particular Court, and the *jurisprudence* commonly followed by former tribunals within that same resort. To shew the indefiniteness of their notions, I shall mention some of the *subsidia* which are referred to in their discussions. 1.

Équité naturelle, loi naturelle. 2. The Roman law. 3. The ancient customs. 4. *Usage, exemple, décisions, jurisprudence.* 5. *Droit commun.* 6. *Principes généraux, maximes, doctrine, science.* It thus appears that they intended to leave many of the points which the code should have embraced to *usage* and *doctrine*: that is, to the tribunals as guided by *usage* and *doctrine*, not by the code itself. This arose partly, no doubt, from a leaning in favour of the old institutions in which they had been trained up, but chiefly from loose conceptions of the nature of a code. Thibaut, who, though a strong advocate of codification, entertains a boundless contempt for the authors of the French code, says of them that whenever they fell upon a subject which they knew not how to handle, they left it to *jurisprudence*: that is, to the old law previously obtaining, to such new dispositions as the Courts might thereafter introduce, or to the mere *arbitrium* of the tribunals. How, then, is it possible for any candid person to argue, that when the very authors of the so-called French code did not intend to make it a code which should supersede all other law, its not having done so is a proof that what they did not attempt cannot be accomplished?

In my future Lectures, when treating of the law of persons and of things, and other questions of arrangement, I shall point out the principal defects in the details of the code, and the ignorance of the principles and distinctions of the Roman law which it evinces. At present I shall mention one monstrous example of this ignorance. Without a distinct conception of the distinction between *jura in rem* and *jura in personam*, or (as it was expressed by the classical jurists) between *dominia* and *obligationes*, no clear conception can be formed of the general structure of the Roman Law, or indeed of what must necessarily be the structure of any body of law whatever. Now, as Savigny remarks, the authors of the French code have never conceived this distinction at all, or at least have never conceived it in its whole universality, but only here and there in particular instances. The darkness, confusion, and incoherency which have been introduced by the want of a clear conception of that distinction, is

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all other
law; but
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be eked
out by
various
subsidia.

Monstrous
ignorance
of the
authors of
the French
code with
regard to
the Roman
law.

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scarcely conceivable. Among other blunders into which it has led the authors of the codes, they have adopted the antiquated and false doctrine which I have mentioned in a former Lecture about *titulus* and *modus acquirendi*, and have spoken of *property* as being the consequence of *obligations*, a profundity of ignorance the more unpardonable because a mistake of the same kind had already been committed in the Prussian code. By the authority of the Chancellor Von Kramer, overruling Suarez (the man of real capacity among the framers of the Prussian code) the head of *contracts* had been stuck into *dominium*, under the erroneous notion that every acquisition of property is preceded by a *modus acquirendi*: that is, *obligationes* had been stuffed into the opposite department of *dominium* or property. This blunder had been so much commented upon by German writers, that the compilers of the French code ought to have been thoroughly acquainted with the merits of the controversy. But, knowing nothing about the matter, instead of clearing up they have only thickened the confusion.

Extreme
haste with
which the
French
code was
drawn up.

Another and a perfectly sufficient reason for the defects of the French code is the extreme haste with which it was drawn up. The original *projet* was prepared, in little more than four months, by a commission consisting of Tronchet, Malléville, Portalis, and Bigot-Préameneu; it was then submitted to the Council of State, where it was discussed article by article. But it is obvious that the examination it received in the debates of this numerous body, many of whom were not even lawyers, could have no tendency to correct the vices in the original conception. The Council of State had in fact no notion whatever of the technical part of legislation. Accordingly, while many pages and chapters in the *Conférences* relate to legislative points of hardly any importance, scarcely the slightest notice was taken of many most important questions of arrangement and expression. In the case of a code, as of everything that should be systematic, the excellence of the first conception is everything; and no alteration in the mere details can cure vices in the original conception.

Of the profound ignorance of the authors of the code on the subject of the Roman law, on which the then existing French law was wholly founded, and of which in truth the code itself is little but a *réchauffée*, Savigny mentions numerous instances. They had indeed a superstitious veneration for the Roman law, but they knew scarcely anything of it: what they knew was derived solely from Justinian's Institutes, and from the various

popular *compendia* which for the most part follow the Institutes. And this accounts for many of the defects of the code. It explains their having passed over many highly important questions of law, because these did not fall within the scope of that institutional treatise, or of the many popular expositions founded on it.

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As I remarked, no code can be perfect; there should therefore be a perpetual provision for its amendment, on suggestions from the judges who are engaged in applying it, and who are in the best of all situations for observing its defects. By this means the growth of judiciary law explanatory of, and supplementary to, the code, cannot indeed be prevented altogether, but it may be kept within a moderate bulk, by being wrought into the code itself from time to time. In France this has been completely neglected; a fact which would of itself suffice to account for the alleged failure of the code. An endless quantity of judiciary law has been introduced; acts of the legislature and *ordonnances* of the King issued by authority of the legislature, have been emitted from time to time separately; but there has been no attempt to work them into the body of the code. So with the Prussian code. The Novels or new constitutions, and the acts of authentic interpretation emanating from the Law Commission exist in a separate state; there has been no attempt to work them into the code, or to amend it in pursuance of them.

No provision for amending the Prussian and French codes, and for keeping down the growth of judiciary and supplemental law by working them into the code from time to time.

The accidental defects which I have now mentioned, as well as others which I shall advert to hereafter, and many on which I shall be silent, account for the partial failure of the Prussian and French codes, not to mention that this failure has been grossly exaggerated. After all, these codes are great improvements on the former state of the law.

I now proceed to notice the objections which have been particularly urged by Savigny, in his treatise *Vom Beruf*, etc. (on the Vocation of our Age to Legislation and Jurisprudence). The professed purpose of this work is, as I have already mentioned, to prove the inexpediency, not of codification in general, but of codification for a part of Germany, and especially of a code proposed by Thibaut. So far, therefore, as the work is in keeping with its professed purpose, it does not apply to codification in general or in the abstract, but to codification, and to a specific scheme of the codification at a given place and time. So far, the warmest partisan of codification might assent to Savigny's conclusion without renouncing his own general views. But while pursuing this ostensible purpose, Savigny employs

Savigny's objections to codification examined.

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many arguments which either directly or obliquely impugn codification considered generally or in the abstract ; and so far as this is the case, his work falls within the scope of my present examination. I advert to these arguments on account of the attention which is due to whatever emanates from a man of Savigny's genius and learning, and because, if his objections can be answered completely, those of other and inferior persons may safely be dismissed without notice.

Savigny is not absolutely an enemy to codification, as the purpose of his book proves ; for if he thought he could prove generally that codes are good for nothing, he would scarcely insist upon arguments peculiar to that particular juncture. He is himself an advocate for a code, even in Germany, to a certain limited extent : he holds a code to be expedient, if it could be confined to the codification of the existing law, without affecting to anticipate future cases. This is in reality an admission almost of the whole question. Most of the partisans of codification would be extremely well content to have a concise and clear description of the law actually existing, and actually applied to past cases, which description would of course be applicable to all future cases resembling those past ones. Savigny thus gives up almost the whole question. As to the anticipation of cases which have not actually arisen, nor resemble any which have actually arisen, it is impossible that any code can include them completely ; but judiciary law is in a much worse plight for this purpose than a code ; for the reason so well stated by Sir Samuel Romilly, namely, that judiciary legislation is necessarily extremely narrow, being confined to the very case on the occasion of which the rule is introduced, or to cases proximately or closely resembling that case. Although the judicial legislator may see at the very time a variety of analogous cases, which he might provide for by a complete law, he is obliged to confine himself to the narrowest possible generalisation. It is, therefore, clear, that although a code cannot exhaust all future cases, judiciary law is in this respect more imperfect still.

Savigny himself suggests one of the best arguments for the possibility of codification, by shewing that one of its greatest difficulties is not insurmountable. In arguing against codification in Germany, he is led to examine the worth of the law now obtaining which a code would supersede. This law is mainly founded on the Roman law ; and he is thus led to speak of the Roman law. In speaking of this legal system, or of the

portion of it which was made by the writings or opinions of jurisconsults, and which is known in Germany by the distinctive name of Pandect law, he is led to admit and praise its coherency. Although it was made in succession by a series of jurisconsults continuing for more than two centuries, each of these jurisconsults was so completely possessed of the principles of the Roman law, and they were all so completely masters of the same mode of reasoning from and applying those principles, that their successive works have the coherency commonly belonging only to the productions of one master mind. Leibnitz and others had remarked, that of the forty jurisconsults (or thereabouts), of excerpts from whose writings the Pandects are composed, the passages from any one are so like those from all the others in manner and style, that it is impossible from internal evidence to distinguish them. Leibnitz expressed this by rather an odd phrase, borrowed from the Roman law itself, calling them *fungible persons*: *res fungibiles* being the technical term for articles which are bought and sold *in genere*, not individually. Each of these writers was master of the Roman law in its full extent; each had the whole of its principles constantly present to his mind, and could argue down from them and apply them with the greatest certainty. Now this suggests an answer to the greatest difficulty about codification. For the greatest practical difficulty in accomplishing it is, that the code cannot possibly be made by one mind; and if made by a number, would probably not be coherent. Now if the production of a succession of jurisconsults, filling two centuries, possesses perfect coherency, *a fortiori* it is possible that a body of law may be equally coherent if produced by a number of persons working in concert, provided they be as fully masters of its principles, and as capable of arguing from them and applying them, as the Roman lawyers were. Such a set of persons would be in a much more favourable position for producing a homogeneous and consecutive whole than persons working in a disjointed and unconnected manner.

But in spite of Savigny's admission of the expediency of codification in a limited sense, and his suggestion of a ground for believing it to be practicable, many of his arguments are directly, and still more of them obliquely, aimed at codification in general. I have already adverted to two of these: the impossibility of anticipating all future cases, and the alleged failure of past attempts at codification. All the remainder of his arguments are equally fallacious, and some of them almost too ridiculous to mention.

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One is the assumption that no determinate leading principles will be followed consistently by the makers of the code, and therefore its provisions must be defective and incoherent. This argument applies only where the makers of the code are incapable of defining and conceiving distinctly and steadily the leading principles of their own system. It applies to the authors of the French code, but, by his own admission, not to the Roman lawyers.

Secondly: he asserts that in an age capable of producing a good code, no code could be necessary. Because Papinian and the other great jurisconsults who made the Roman law were able lawyers, and because good expositions of the law have been made by private hands, does it follow that a code is useless? Good expositions, and good judiciary law made by able jurisconsults, do not supply the demand for a code, though they render it somewhat less necessary. Savigny falls into the extreme absurdity of putting expositions of the law by private hands precisely on a level with the codification of it by the authority of the supreme legislature. The exposition may be just as well constructed as the code, but the essential difference will remain, that the one is authorised and the judge is bound to abide by it; the other is no expression of the will of the sovereign, and the judge is not obliged to follow it: which makes all the difference between uncertain and certain law.

Savigny affirms, contrary to the fact, that during the times of the classical jurists the want of a code or digest was not felt. This assertion is directly in the teeth of a passage of Suetonius, quoted by himself at the bottom of the very same page, where that author mentions it as a purpose of Cæsar, *jus civile ad certum modum redigere, atque ex immensâ diffusâque legum copia, optima quæque et necessaria in paucissimos conferre libros*. Livy also, who lived at the beginning of the period of the classical jurists, and Tacitus, who, like Suetonius, lived about the middle of the same period, speak in the same strong terms as Suetonius of the enormous bulk of the law, shewing the want of a code or digest to have been generally felt.

That a code constructed in an age incapable of making a good one, has a tendency to give perpetuity to the ideas of that incapable age, may to a certain limited extent be true. And this leads me to advert to the strange assumption of Hugo and other enemies of codification, that the code when made will be unalterable, and will therefore transmit to more enlightened ages the comparatively bad legislation of a comparatively dark

one. I cannot understand why any such absurd supposition is entertained.

Another equally absurd argument is this: that all law is not in all respects the work of the sovereign legislature, but is very generally formed from customs which were rules of positive morality anterior to their adoption by the legislator. In this there is nothing new; nothing that has not been known at all times. From this, however, some of the German jurists infer—I cannot conceive how—that codification itself is bad.

The idea darkly floating before their minds may be, that legislation ought to be governed by actual experience of the wants and exigencies of mankind. And here I would remark that a great mistake is often made with respect to Bentham's notions of law. Bentham belongs strictly to the historical school of jurisprudence. The proper sense of that term as used by the Germans is, that the jurists thus designated think that a body of law cannot be spun out from a few general principles assumed *à priori*, but must be founded on experience of the subjects and objects with which law is conversant. Bentham therefore manifestly belongs to this school. He has again and again declared in his works that the reports of the decisions of the English Courts are an invaluable mine of experience for the legislator. The character of the historical school of jurisprudence in Germany is commonly misconceived. They are imagined to be enemies of codification, because one or two of the most remarkable individuals among them, such as Hugo and Savigny, are so; but many others, Thibaut for example, are its zealous friends. The meaning of their being called the historical school is simply this, that they agree with Bentham in thinking that law should be founded on an experimental view of the subjects and objects of law, and should be determined by general utility, not drawn out from a few arbitrary assumptions *à priori* called the law of nature. A fitter name for them would be the *inductive* and *utilitarian* school.

Another strange objection made by Savigny to codification is this: He assumes that it is bad, because its effect would be to make the necessary defects of the law more visible; so that persons knavishly inclined might avail themselves of the bad parts of the law to injure other people. This is a mere repetition of the old argument for law taxes, that they check litigation. It assumes that the law is inevitably uncertain, and that no attempt should be made to secure rights, lest, by the abortive attempt, knaves should be apprised of their hopeless insecurity. The

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objection moreover conflicts with itself ; for if the defects of the law are rendered more conspicuous by codification, codification must tend to cure those defects. If they are made to stand out more clearly by codification, this must tend to their correction.

Another argument, which none but those who know the Germans can appreciate, is this : that if a code could be made mechanically and without any difficulty at all, this would be a reason for rejecting it. An assumption that difficulty is good for its own sake. The merit of removing the difficulty is great, *ergo* it is inferred that a code, if it can be made easily, cannot be good. Such an argument from such a man may well appear astonishing. But the truth seems to be that Savigny's dislike to the codification is not the effect of his own arguments, or of any arguments, but of a natural antipathy to the French (who were long hated in Germany because they behaved infamously there), transferred by a natural association from the French to their code, and from the French code to all codes. There is no more striking example how rash it is to argue from a man's absurdity on one occasion to prove his general incapacity. Savigny's argument, even as against codification in Germany itself, is null. It rests on the assumption that men competent to the task cannot be found : but this he only assumes, not proves ; and it is inconsistent with his own admission of the desirableness of a code, provided it do not attempt to include future cases : but to make such a code as he is willing to admit, would be nearly as difficult as to make that which he rejects. Further, he himself proposed that a complete and systematic exposition of German law should be executed by the jurisconsults of Germany ; and anticipates great advantage from this work, if entrusted to competent hands. But the difficulty of systematically expounding the law is evidently equal to the difficulty of codifying it. A code is merely an exposition sanctioned by the supreme legislator and by his will converted into law.

Before I quit the subject of codification, I shall just remark that one advantage not generally adverted to would *flow* from it : an improvement in the character of the legal profession. If the law were more simple and scientific, minds of a higher order would enter into the profession, and men in independent circumstances would embrace it, who are now deterred by its disgusting character ; for disgusting it really is. What man of literary education and cultivated intellect can bear the absurdity of the books of practice, for example : and many other parts of

the law? Nothing but a strong necessity, or a strong determination to get at the *rationale* of law through the crust which covers it, could carry any such person through the labour. But if the law were properly codified, such minds would study it; and we might then look for incomparably better legislation, and a better administration of justice, than now. The profession would not be merely venal and fee-gathering as at present, but, as in ancient Rome, would be the road to honours and political importance. Much, no doubt, of the drudgery of the profession would still be performed by persons aiming only at pecuniary reward, but the morality prevailing in the entire profession would be set, in a great degree, by this high part of it, which would also comprise the practical legislators of the community. This would be a highly important consequence of the simplification of the law: for I am fully convinced that only from enlightened and experienced lawyers is any substantial improvement of the law ever to be hoped for.

LECTURES ON JURISPRUDENCE.

ON LAW

CONSIDERED WITH REFERENCE TO

ITS PURPOSES,

AND TO THE

SUBJECTS WITH WHICH IT IS CONVERSANT:

AND, IN PARTICULAR, OF THE

LAW OF THINGS AND THE LAW OF PERSONS OR STATUS.

LECTURE XL.

Note.—At the time of the publication of the former edition of these Lectures, it was supposed by their late editor that this Lecture had been irretrievably lost; and in a note announcing the unavoidable hiatus, it was added:

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‘I can hardly hope that any member of Mr. Austin’s class still possesses notes of his course. But if any such memoranda are in existence, I should esteem myself under a great obligation to any gentleman who would permit me to see them.—S. A.’

It was, I believe, in answer to this appeal, that the very full and clear notes of the Course of Lectures preserved by Mr. John Stuart Mill were furnished by him for the use of the late Mrs. Austin. These notes have now been collated with the former edition for the purpose of the present revision, and it is most fortunate that the present Lecture, which commences the author’s leading division of the main part of his subject, can be supplied from a source so reliable.

I may further remark here, that the extent of the hiatus in this place was not fully known to the late editor. The latter part of Lecture XXXIX (as now printed), containing the greater part of the author’s remarks upon codification, and entirely omitted from the Lectures as formerly published, forms in J. S. M.’s notes the matter of an entire Lecture of more than usual length. The recovery of this Lecture is at the present time also peculiarly valuable.—R. C.

FROM law considered with reference to its *sources*, and to the manner in which it begins and ends, I pass to law considered with reference to its *purposes*, and to the subjects about which it is conversant.

The first great distinction of Law considered under this aspect, is the celebrated one into the Law of Persons and the Law of Things; or (as I think it ought to be stated), the Law of Things and the Law of Persons.

This distinction may be stated generally (as I have stated it in my Outline) as follows:—

‘There are certain *rights* and *duties*, with certain *capacities* and *incapacities* to take rights and incur duties, by which *persons*, as subjects of law, are variously determined to certain *classes*.

‘The rights, duties, capacities, or incapacities, which determine a given person to any of these classes, constitute a *condition* or *status* which the person occupies, or with which the person is invested.

‘One and the same person may belong to *many* of the classes, or may occupy, or be invested with, *many* conditions or *status*. For example, one and the same person, at one and the same time, may be son, husband, father, guardian, advocate, or trader, member of a sovereign number, and minister of that sovereign body. And various *status*, or various conditions, may thus meet or unite in one and the same person, in infinitely various ways.

‘The rights, duties, capacities, and incapacities, whereof conditions or *status* are respectively constituted or composed, are the appropriate matter of the department of law which commonly is named the *law of persons*—*Jus quod ad Personas pertinet*. Less ambiguously, and more significantly, that department of law might be styled the “Law of Status.” For though the term *persona* is properly synonymous with the term *status*, such is not its usual and more commodious signification. Taken with its usual and more commodious signification, it denotes *homo*, a man (including woman and child); or it denotes an aggregate or collection of men. Taken with its usual and more commodious signification, it does not denote a *status* with which a man is invested.

‘The department, then, of law, which is styled the Law of Persons, is conversant about *status* or conditions; or (expressing the same thing in another form) it is conversant about *persons* (meaning *men*) as bearing or invested with *persons* (meaning *status* or *conditions*).

‘The department of law which is opposed to the Law of Persons, is commonly named the *Law of Things*; *Jus quod ad Res pertinet*.⁸⁴

⁸⁴ Outline, pp. 40, 41, vol. i. *ante*.

This most obscure and obscuring expression may be explained as follows :—

Res, in the language of the Roman law, has two principal meanings. It denotes, in the first place, things, properly so called, together with *persons*, acts, and *forbearances*, considered as the subjects and objects of rights and duties. These are called by the Roman jurists *res corporales*, which they define *materia iuri subjecta, in qua jura versantur ; ea quæ juri nostro afficiuntur, quæ tanquam materia ei sunt proposita*. In the second sense, *res* denotes what are termed by the same jurists *res incorporales* ; which they define *ea quæ ad jura pertinent ; ut jus hæreditatis, jus utendi fruendi, jus servitutis, obligationes quocunque modo contractæ*.

This division of things into corporeal and incorporeal, tangible and intangible, sensible and insensible, arose from a tendency which I formerly pointed out, in the Roman jurists, to import into their legal system the terms and distinctions of the Greek philosophy. In the philosophy of the Stoics, the words *tangible* and *intangible* were equivalent to *sensible* and *insensible*. *Tangible* was not confined to objects perceptible by the sense of touch, but extended to all objects perceptible by the senses. *Intangible* meant *not* perceptible by the senses. By the Epicureans, the same words appear to have been used in a sense precisely equivalent, as is proved by the well-known line of Lucretius : *Tangere enim et tangi, nisi corpus, nulla potest res* ; where the context proves that he is not speaking only of the sense of touch, but of perception by any of the senses.

The application of the term *corporeal things* to the subjects and objects of rights and duties, and of the term *incorporeal things* to rights and duties themselves, is remarkably unhappy. For though some of the former are corporeal, others are as incorporeal as rights and duties themselves. Such, for example, are *forbearances*, which are the objects of innumerable rights ; but *forbearances*, far from being sensible, are mere negations of actions in pursuance of desires and intentions. Accordingly, nothing can be more inconsistent than the language of the Roman lawyers. They begin by limiting *things corporeal* to *things* properly so called : that is, to those *permanent external objects* which are not *persons*, considered as the subjects and objects of rights, and to *persons* considered from the same aspect. These are doubtless corporeal. But in the details of their treatises the same jurists include in the terms *res corporales*, the objects of *obligationes (stricto sensu)* ; as, for instance, of the obligations arising from contracts.

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In English law, we find the same useless and misleading jargon, and employed, as usual, still more inconsistently; for in English law the word incorporeal is applied, not to all rights and duties, but to certain *hereditaments*. Hereditaments are divided into *corporeal* hereditaments and *incorporeal* hereditaments. But if the hereditament mean the *right* itself, that is always incorporeal, not less in the case of what are called corporeal than what are called incorporeal hereditaments.

If the hereditament mean the *subject* of the right, the subject of an incorporeal hereditament is as corporeal as the subject of a corporeal hereditament. For instance, a right to tithes is an incorporeal hereditament, and the *right* is incorporeal; but so is the landlord's right to the estate itself; yet that is called a *corporeal* hereditament. The subjects of both rights are the same: the land itself, or its produce; which are of course corporeal. The distinction, in short, is totally unmeaning. It cannot be expounded accurately by abstract and general terms. In order to know what is an incorporeal hereditament, it is necessary to go through the whole list of the rights which the law marks with that name. They have no properties in common whatever.

Now, since the Law of Persons means the law of *status* or conditions, and since *res* signifies rights and duties, the Law of Things was probably so called for the following reason:—Being conversant with rights and duties as abstracted from conditions or *status*, or being conversant with rights and duties considered in a general or abstract manner, it was called the Law of Things, or the Law of Incorporeal Things: that is, the department of law relating to rights and duties *generally*, or to all rights and duties *except* those constituting *status* or conditions.

The Law of Things in short is The Law—the entire *corpus juris*; minus certain portions of it affecting peculiar classes of persons, which, for the sake of commodious exposition, are severed from the whole of which they are a part, and placed in separate heads or chapters. Such was most probably the origin of the name, which would be of little moment if the expression had not given rise to many absurd speculations on the appropriate subjects of the two departments.

The Law of Persons, then, is that part of the law which relates to *status* or conditions.

The Law of Things, like the Law of Persons, relates to rights and duties, but to rights and duties considered generally and in the abstract; exclusively of the rights and duties which are the constituent elements of conditions or *status*. That such was the

general conception of the distinction by the Roman jurists, is manifest from the order adopted in the Institutes. The second book of the Institutes opens with words to this effect:

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‘Having treated of the Persons, let us now treat *de rebus*.’ It then proceeds to divide *res* into *corporales* and *incorporales*, and then treats of rights and duties under their various subdivisions.

It is absurd to suppose that the Law of Persons can peculiarly relate to persons, meaning *homines* or human beings; or the Law of Things to *things*, in the proper sense of the term. They *both* relate to rights and duties which reside in or are incumbent upon *men*. Each, therefore, relates to persons in that proper sense of the term, quite as much as the other. Many rights and duties treated of in the Law of Persons relate to things properly so called: as, for instance, an estate in land belonging to a married woman: and many rights and duties treated of in the Law of Things have no regard to *things* proper: as, for instance, the right arising from an obligation to *forbear* under a *contract*.

Much, therefore, of the Law of Persons relates to things properly so called, while much of the Law of Things does not.

The distinction, therefore, between the Law of Things and the Law of Persons rests upon the notion of *status* or condition. The Law of Things is *the law*; the *corpus juris*, minus the law of *status* or conditions. The Law of Persons is the law of *status* or conditions, detached for the sake of convenience from the body of the entire legal system.

The question, therefore, which first arises is this: What constitutes a *status* or condition?

What constitutes a *status*, or condition.

The notion is not capable of being fixed with perfect exactness. There are sets of rights and duties, capacities and incapacities, which one person might deem to constitute *status* or conditions, while another might refer them to the Law of Things.

After the best consideration which I have been able to give to the subject, and after an extensive examination of the opinions of others, I still find no mark by which a *status* or condition can be distinguished from any other collection of rights and duties.

The distinction between the rights and duties capacities and incapacities constituting a *status*, and any other rights duties capacities and incapacities,

The sets of rights and duties, or of capacities and incapacities, inserted as *status* in the Law of Persons, are placed there merely for the sake of commodious exposition. The same reason retains many important sets of rights and duties, which might form many so-called *status* or conditions, in the Law of Things.

The sets of rights and duties called condition or *status* have no common generic character which determines what a *status* or

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not susceptible of any strict definition. No generic character common to them all ; but they bear the following marks :
1. They reside in an individual as belonging to a class.

2. The rights and duties capacities and incapacities, constituting a *status*, commonly impart to the party invested with them a conspicuous character, and have an extensive influence over his social relations. This not a certain mark of *status*.

3. They regard specially

condition is. Certain sets of rights and duties are detached for convenience from the body of the legal system, and these sets of rights and duties are styled *status* or conditions.

Speaking, however, generally, the rights and duties capacities and incapacities which constitute *status* or conditions, bear the following marks :—

First : universally, or nearly universally, a *status* or condition resides in the party who is invested with it, as being a member of a *class* of persons, not as being that very individual person. *Singular* or peculiar rights may be conferred on a party by a *privilege*, or duties or incapacities may be laid upon a party by a *privilege* ; but these are not considered as forming a condition or *status* with which he is invested. The reason of this seeming caprice has been given in a note to my Tables. It is out of the purpose of a body of law to insert in it rights or duties peculiarly affecting given individuals. The party asserting these rights, or endeavouring to enforce these duties, is obliged to shew the special act of the sovereign legislature which conferred or imposed them ; the claimant must prove the rights conferred upon him by the privilege as he would prove his rights under a special contract. A privilege is rather a peculiar *title* than a general law of which the tribunals take notice.

Secondly : the rights and duties capacities and incapacities which constitute a *status* or condition, are commonly considerable in number and various in kind ; or, at least, are commonly considerable in number ; so much so as to impart to the party invested with them a conspicuous character, and affect him in most or many of his social relations.

Such are the rights and duties capacities and incapacities of husband and wife, parent and child, guardian and ward, master and slave, of an alien, an insane person, or a magistrate. Each of these sets of rights and duties modify extensively the various relations to his fellow-creatures of the party invested.

But this is no certain mark for distinguishing a *status* or condition. For the sake of commodious arrangement a set of rights or duties, of no considerable importance, might be detached from the body of the law and placed in a chapter apart. Looking at the ends of the distinction between Law of Persons and Law of Things, any set of rights and duties may be placed in the Law of Persons, if it regard specially a *class* of persons in whom it resides, or on whom it is incumbent.

Thirdly : the rights and duties capacities and incapacities constituting *status* or conditions, regard specially the class of

persons by whom the status or condition is borne. There are rights and duties capacities and incapacities which have no special regard to any peculiar class. Such, for example, are the rights and duties which the law has annexed to *contracts*; or the capacity to enter into a contract, whether as promisor or promisee. With the exception of a few classes of persons who are legally unable to enter into contracts, or who can do so only in a qualified manner, the rights and duties arising from a contract may attach to persons of any class. But there are also rights and duties capacities and incapacities which regard peculiar classes of persons. Such, for instance, are the incapacities of infants and married women; the peculiar rights of masters and servants, of bankrupts, of magistrates, of soldiers, and of other classes of persons in indefinite variety. It is true that these rights and duties capacities and incapacities also regard persons of other classes in so far as they happen to be related by special ties to persons of these peculiar classes. For example, if you contract with an infant, the consequences of the contract to yourself are modified by his peculiar *status* or condition and the incapacities which constitute it. Still, though these rights and duties capacities and incapacities do not regard *exclusively* persons of the particular class, they do *specially* regard such persons. And here, if anywhere, will be found the *rationale* of the distinction between the Law of Things and the Law of Persons. Whenever a set of rights and duties capacities and incapacities regards specially and constantly one class of persons, every person of that class has a *status* or condition, composed of those special rights and duties capacities and incapacities. But those rights and duties capacities and incapacities which have no peculiar regard to any peculiar class, are matter for the Law of Things. That such is the import of the distinction, as it is commonly drawn, I would not affirm; but such it must be, if the distinction mean anything determinate.

On the whole, then, the marks of a *status* or condition are these:—First, it resides in a person as member of a *class*. Secondly, the rights and duties capacities and incapacities composing the *status* or condition, regard or interest specially the persons of that class. Thirdly, these rights and duties capacities and incapacities are so considerable in number, that they give a conspicuous character to the individual, or extensively influence his relations with other members of society. This last property is, I think, not essential: and would not be regarded in a body of law rationally constructed.

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Having stated the distinction between the Law of Things and the Law of Persons, I shall proceed to state what appear to me to be the *uses* of the distinction : the statement of which will throw additional light upon its *nature*. But I have first an observation to make.

An objection answered.

Any rights and duties, not *singular*, or peculiar to a specific or determinate individual, are properly determined to a *class* of persons. For example, the rights and duties arising from a contract, are determined to the class of *contractors*. The rights and duties arising from a mortgage, are determined to the class of *mortgagors*, and to that of *mortgagees*. If we liked, we might place the rights residing in, and the duties incumbent upon, these classes of persons, in the *jus personarum*, and deem them to constitute *status* or conditions.

But we must consider, in order to clear up this difficulty, that classes of persons are of two kinds : *first*, classes which might comprise persons of any description, or nearly so ; no persons being necessarily excluded, except some classes labouring under a special incapacity which would itself constitute a *status* : *secondly*, classes which can only comprise persons of one given description. For example, whatever be his other characters, any person may be a contractor. None, except persons who, being under twenty-one years of age, are *infants* by the English law, are under incapacity to contract. Rights and duties belonging to the Law of Things, are of a large and miscellaneous class, having no special regard to peculiarities of position ; they regard equally all persons, *except* persons in a special position, and under a peculiar incapacity. The rights and duties, for instance, which arise out of a contract, regard all contractors, and though contractors are a special class, there is scarcely any person who may not belong to that class. I ought, therefore, to have added to the distinguishing mark of a *status*, that the class itself must not be such that it may comprise any, or nearly any, person whatever. Classes possessing a *status* or condition are classes which *can only* comprise a part of the community ; as husbands and wives, masters and servants, parents and children ; any or all of whom may be promisors for promisees, mortgagors or mortgagees, contractors, and so on.

The class must be such as from its nature cannot include all or nearly all persons.

This observation is, I think, an answer to Mr. Bentham, who, I am forced to admit, appears to me to be inconsistent and obscure in all he says on this subject. The difficulty of dealing with the word *class*, on account of its ambiguity, creates the whole difficulty of the case. By taking the word *class* in

its widest sense, we might throw the whole body of law into the Law of Persons: but that was not the object of those who have taken the distinction: they wished to separate the rights and duties specially affecting *portions* of the community from rights and duties of more general interest.

I now proceed to the *uses* of the distinction.

Uses of the
distinction.

The Law of Things is that department of the *corpus juris* which regards rights and duties capacities and incapacities, considered in a general or abstract manner: that is to say, as abstracted from the rights and duties capacities and incapacities constituting conditions or *status*. The Law of Persons is that department of the entire body of law which is concerned with conditions or *status*.

Now, although the idea of *status* or condition is essential or necessary, and must exist in every body of law, the division of the *corpus juris* into *Jus Personarum* and *Jus Rerum* is not essential or inevitable. It is adapted as being commodious; as being a good basis for the arrangement of the *corpus juris*. But it is easy to conceive arrangements founded on principles altogether dissimilar. The main advantages of this division seem to me to be these.

First: in the Law of Things, or the Law of Things Incorporeal, or the Law of Rights and Duties, or *The Law* generally, all which can be affirmed of rights and duties considered generally, or as abstracted from *status* or condition, is stated once for all. One advantage, therefore, of the division is that it is productive of brevity: again, the general rules and principles with which the Law of Things is properly or directly concerned, are preserved detached and abstracted from everything peculiarly relating to particular classes or persons; they are, therefore, presented more clearly than if they were interspersed with that more special matter. Each rule or principle is apprehended more easily and distinctly than if the modifications which it receives from that more special matter, were appended or annexed to it. Being brought together more closely, their mutual relation and dependency is more easily perceived. The brevity, therefore, which this division of the *corpus juris* produces, tends also to its clearness. For example, the rights and duties which constitute, and are annexed to an estate in fee, or property in a personal chattel; the rights and duties arising from contracts, or from delicts, are stated much more clearly than they could be if they were presented as modified by the peculiar rights, or the peculiar incapacities, of married women or of infants.

1. Repetition, and consequent voluminousness, avoided.

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2. The portions of law specially affecting peculiar classes, rendered more accessible and cognoscible.

Secondly: by distinguishing such parts of the law as are peculiar to particular classes from the parts which are common and of universal application, and by placing the former under a peculiar head, or appending them to the body of the law in a separate chapter, the matter peculiar to every particular class is rendered easy of reference. The distinction is thus attended (or would be attended, if its principle were steadily adhered to) with one great and indisputable advantage, which the rational advocates of codification have most insisted upon. The law, I am satisfied, can only be known extensively to lawyers; but every class of persons might know, to a considerable extent, the parts of the law specially relating to themselves. To this end, those special provisions must not be interspersed through the whole body of the law, but must be placed by themselves under a peculiar head. This head may again comprise under itself many other smaller heads; for example, the head 'Trader' might be divided into a variety of subordinate heads, to facilitate the knowledge of the matter peculiarly affecting each class of traders; and might thus be, in little, what the *corpus juris*, on a larger scale, ought to be.

Identity of the division into Law of Things and Law of Persons with Mr. Bentham's division into General and Special Codes.

This plan of collecting under separate heads such portions of the law as are peculiar to special or particular classes, is strongly and justly recommended by Bentham. His general code, as distinguished from his proposed special codes or bodies of law specially relating to particular classes, is in fact the *jus rerum*, or Law of Things, of the classical Roman jurists. If Bentham had ever given to the Roman law the attention it well deserves, he would have found that his own distinction precisely tallied with that which he rejects with unmeasured, and what, in spite of my veneration for Mr. Bentham, I must call *ignorant*, disdain. His mistake is excusable, because he had never read the Roman law itself, and only understood this distinction as it was distorted and travestied by Sir William Blackstone, who, misunderstanding the ambiguous word *jus*, actually translates *jura personarum* and *jura rerum* the *rights of persons* and the *rights of things*! It is a strong presumption in favour of the distinction, that Mr. Bentham by his unassisted invention arrived at it; for he certainly did not derive it from the Roman law.

Two other possible divisions of the *Corpus Juris*.

Instead of this division, there are many other divisions of the *corpus juris* which *might* be adopted. I shall briefly advert to two of these possible divisions, because they may serve to illustrate that of which I have been treating.

First; the head *jus rerum* might be rejected, and the whole body of the law divided into special codes, heads, or chapters, appropriate to peculiar classes of persons. The inconvenience of this would be, that the matter which is common or universal or has no special relation to any peculiar class, must be inserted under every head. In effect, each of the special codes would consist of the whole of the common matter, *plus* the matter specially referring to the peculiar class. The repetitions of the general matter would be as numerous as the special classes; and consequently the bulk of the whole body of law would be truly immense. By adopting the division into *Jus Rerum* and *Jus Personarum*, the description of the common matter is disposed of at once. No inconvenience arises from the separation: each of the particular codes is equally complete; the facility to persons belonging to any special class, of referring to the whole of law affecting them, is as great: the only difference is, that they must look for it under two heads or chapters instead of one; which is no increase of the trouble. For example, an infant is about to enter into a contract: the infant or the person designing to contract with him refers to the chapter on infants to find in what manner the *status* of an infant modifies the general provisions of the law on the subject of contracts; and if this is not intelligible to him he refers to the title 'Contracts' in the General Code. The operation is analogous to the logical process of laying a species on a genus. By adding the properties peculiar to the species, to those common to the genus, we obtain the whole essence of the species, or all the properties belonging to it. The general matter which forms the *jus rerum*, is related to the matter of the several chapters constituting the *jura personarum*, as the *genera* of logicians are related to the *species* under them. By the generic name all the properties which are common to all the species or narrower classes included in the genus, are marked at once; the peculiar properties of each species are marked afterwards by specific names. So in the *jus rerum*, the rights and duties capacities and incapacities common to all parties, or which have no peculiar reference to any separate class, are described once for all; and the rights and duties capacities and incapacities which refer peculiarly to classes of persons, are placed in codes or chapters respectively appropriated to those classes. In each operation there is a sort of classification or of abstraction; in each the effects are comprehension brevity and clearness.

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Not to exaggerate, however, the effect of this separation of the body of law into the General Code and a number of special Codes, in rendering the law cognoscible, I must observe that a complete knowledge of any of these separate parts implies a knowledge of the *jus rerum* of which they are only a modification, and requires therefore a knowledge of that immense whole which it modifies. In the example which I have already made use of, that of an infant entering into a contract, it is obvious that we must know the general nature of contracts, and the rights and duties annexed to them, to enable us to know in what manner those rights and duties are modified by the peculiar *status* of an infant.

A second possible division is the following:—The *jus personarum* might be rejected, and the sets of special provisions relating peculiarly to special classes, not collected under appropriate chapters, but appended to the more general provisions which they modify and control. For example, under the head of husband and wife, we find the provision specially affecting married persons, detached from the description of the right of property and the effects of contracts in the General Code. But the special chapter might be expunged, and the special matter which it contains might be appended to that general description. On this principle of arrangement the Code might be as concise as on the esteemed and ancient one of the classical jurists. But brevity and clearness in the exposition of the general principles would be lost; for to every principle, all the modifications it receives from the peculiar position of every particular class must be appended; and the peculiar law of each class being scattered everywhere through the Code, the class could not easily find their own peculiar law, but must pick it out bit by bit; not finding it collected to their hands.

The division into *jus personarum* and *jus rerum* combines the advantages of both these adverse methods. Like the one, it enables all classes to find easily the law peculiarly affecting themselves; like the other, it presents in a connected series those principles of the law which are common to all classes.

These, however, are not so much the advantages which the division *has* produced as those it *would* produce if its principles were clearly and strictly pursued. By the Roman lawyers, as for example in the Institutes, the special law of particular classes is often placed in the Law of Things: and the same in Blackstone, in the French Code, and in almost all the other compilations of lawyers. Hence the question has been much agitated,

The division into Law of Things and Law of Persons preferable to either. The distinction not correctly and consistently followed out by its authors.

whether the *jus personarum* of the Roman lawyers *was* properly the law of *status* (or the description of the rights and duties, capacities and incapacities constituting *status*); or merely a description of the facts or events by which *status* is invested or divested. Whether for instance, under *marriage* all the rights and duties peculiarly affecting husbands and wives, were intended to be inserted, or merely marriage itself, the incident by which the *status* arises, with the modes by which marriage may be dissolved. The truth is that the authors of the distinction have not been consistent. Sometimes they inserted in the *jus personarum* descriptions of the rights and duties composing the *status*, while in other cases they simply described the investing and divesting facts, reserving the description of the rights themselves for the Law of Things.

If, therefore, we take the distinction not as it would exist if its principle were steadily and consistently pursued, but as it stands in all existing bodies of law, it is impossible to describe it with precision and clearness. But if the Law of Persons is strictly the law of *status* or conditions, that is, of the classes of conditions which for commodious exposition are kept out of the Law of Things, the distinction is clear. Sometimes matter which might be placed in the Law of Persons, is inserted in the Law of Things for the same purpose, convenience of exposition. Why for instance should not *heir*, or *executor*, or *administrator* be a *status*, as well as husband and wife? Sir Matthew Hale actually places in the Law of Persons the relation of ancestor and heir; but by a strange inconsistency places the law of executors and administrators in the Law of Things. But perhaps it answers better the purpose of commodious exposition, to append this part of the law to the general principles which it modifies.

To describe, then, the distinction as it exists in any particular body of law, is to describe the whole arrangement of the *corpus juris*, and to assign the reason why every part of it is in that particular place. This is not relevant to the purpose of my present course.

LECTURE XLI.

STATUS.—ERRONEOUS DEFINITIONS EXAMINED.

IN my last Lecture, I endeavoured to explain the import of the distinction between the Law of Persons and the Law of Things.

Endeavouring to explain the import of the distinction, I

stated the meanings of the obscure and obscuring expressions 'jus personarum' and 'jus rerum:' or (in the language of the classical Roman jurists) 'jus ad *personas* pertinens, et jus ad *res* pertinens.' And I also stated the import of the distinction, as it was conceived in general by those who devised it: namely the same Classical Jurists in their elementary or institutional treatises.

Having explained the import of the distinction, and cleared up the terms in which it is usually expressed, I proceeded to illustrate its nature, by shewing its purposes and uses. I shewed that the distinction is purely arbitrary: or that the distinction was devised by its authors, to facilitate the arrangement and exposition of the *corpus juris*, or entire body or system of positive law. I showed that the arrangements which are built on the distinction (or which might be built on the distinction), are probably the most commodious of which the *corpus juris* will admit. And I shortly contrasted the arrangements which are built on this distinction, with certain possible arrangements founded on other principles.

The Law of Persons being the Law of *Status*, and the Law of Things being the Law *minus* the Law of *Status*, it is clear that the distinction between the Law of Persons and the Law of Things, turns upon the notion of *Status* or *Condition*, or upon the notion of *person* as meaning *status* or *condition*. The sets of rights or duties, capacities or incapacities, which are deemed *status*, conditions, or persons, are detached from the bulk of the legal system, and placed in a peculiar department styled the Law of Persons: Or certain sets of rights, etc. are detached from the bulk of the legal system and placed in that peculiar department, and are styled therefore *status*, conditions, or persons. And the bulk of the legal system, *minus* these *status* or conditions, is distinguished by the name of 'the Law of Things,' from that peculiar department to which conditions are banished.

'I have remarked' (observes Savigny, in the treatise on which I commented the other evening), 'that the ideas of *jus in rem* et *jus in personam* (or *dominium et obligatio*) are, in the Roman Law, all-pervading; "*überalleingreifend*."⁸⁵ And the same remark will apply to the idea of *status*: for on the idea of *status* the distinction between the Law of Persons and the Law of Things is founded.'

Accordingly, I endeavoured in my last Lecture to determine

⁸⁵ '... wie wichtig und überall-eingreifend im römischen Rechte die höchst bestimmte Begriffe von dinglichen Rechten und Obligationen sind. Dasselbe gilt von Begriff des Status. Hier nun liegt die Unterscheidung von Personenrechten und Sachenrechten zum Grunde.'—Savigny, *Vom Beruf*, etc. p. 98.

the notion of *status*. Or (rather) I endeavoured to shew that the notion cannot be determined with a close approach to precision: that certain sets of rights or duties, or capacities or incapacities, are, for the sake of commodious arrangement, detached from the body of the law, and placed in a peculiar department: and that to those sets of rights, etc., which for the sake of arrangement and exposition it is found convenient thus to detach, the name of *status* is applied, or is more particularly applied.

I now will examine certain definitions of *status*, with certain definitions of the distinction founded on the idea of *status*, which, in my opinion, are thoroughly erroneous, and have engendered much of the obscurity wherein the idea and the distinction are involved.

According to a definition of *status*, which now (I think) is exploded, but which was formerly current with modern civilians, 'Status est *qualitas*, cujus ratione homines diverso jure utuntur.' 'Exempli gratia,' (adds Heineccius,) 'alio jure utitur liber homo; alio, servus; alio, civis; alio, peregrinus.'⁸⁶

Certain erroneous definitions of the idea of *status* and of the distinction (founded on that idea) between *jus personarum* et *jus rerum*. First erroneous definition: *Status* an occult quality (Modern civilians).

Now a given person bears a given condition (or, in other words, belongs to a given class), by virtue of the rights or duties, the capacities or incapacities, which are peculiar to persons of that given kind or sort. Those rights or duties, capacities or incapacities, are the condition or *status* with which the person is clothed. They are considered as forming a complex whole: And, as forming a complex whole, they are said to constitute a *status* which the person occupies, or a condition, character, or *person*, which the person bears.

But, according to the definition which I am now considering, the rights or duties, capacities or incapacities, are not themselves the *status*: but the *status* is a quality which lies or inheres in the given person, and of which the rights or duties, capacities or incapacities, are merely products or consequences.

The definition (it is manifest) is merely a *case* of the once current jargon about *occult qualities*. Wherever phenomena were connected in the way of cause and effect (or of customary antecedence and sequence, or customary coexistence), it was usual to impute the so-called effect (not to the customary antecedent, or to the customary coexistent), but to an occult quality, or occult property, which was supposed to intervene in the business of causation.

⁸⁶ 'Homo et persona grammaticæ sunt synonyma, at juridicè differunt. Omnis quidem persona homo est, sed non omnis homo est persona. Homo est, quicumque habet mentem ratione præditam in cor-

pore humano: at persona est homo cum statu suo consideratus. Qui itaque status non habet, is nec est persona.'—Heineccii *Recitationes*, lib. i. tit. 8.

For example: In the case of volition followed by action or forbearance (which I analysed in a former lecture), the antecedent desire or aversion, with the consequent action or forbearance, are really the only entities. But, this notwithstanding, a certain entity styled the will (or a certain willing will), is supposed to be the cause of the desire or aversion which is truly the cause or antecedent of the consequent action or forbearance.

In the case of a condition or *status*, the occult quality (if it mean anything) is the fact or event from which the condition arises: that is to say, through or by which, or *ratione cuius*, the party bears the rights, or is subject to the duties, of which the condition is composed. In the case, for example, of the correlating conditions which are borne by husband and wife, the occult quality (if it mean anything) is the fact of the marriage: For through or in consequence of the marriage (or *ratione ejus*) the parties to the marriage contract '*diverso jure utuntur*;' that is to say, they are clothed with the rights and capacities, and subjected to the duties and incapacities, which distinguish husbands and wives from persons of other classes, or which constitute the *status* or conditions borne by husbands and wives.

But, not content with this homely account of the matter, the scholastic jurists imagined a fictitious entity intervening between the condition and the fact engendering the condition: '*qualitas ratione cuius homo diverso jure utitur*:' an occult quality inhering in the given person, by virtue whereof he is clothed with distinguishing rights, or is subjected to distinguishing duties. And to this fictitious entity (and not to those rights or duties, or to the fact which begets them), these scholastic jurists gave the name of *status*.

Before I dismiss the definition which I am now considering, I will remark that the *qualitas* in question (assuming its existence), will not distinguish a *status* or condition from another set or collection of rights or duties. If the rights or duties which constitute a *status* or condition spring from an occult quality lying in the person who bears it, every right or duty must spring from a similar quality in the person who is clothed with the right, or on whom the duty is incumbent. For example: An estate in fee-simple, or an estate for life or years, is not the effect or consequence of the descent from the deceased ancestor, or of the conveyance or demise. It is clearly the effect or consequence of a certain occult quality which lies in the tenant in fee or the tenant for life or years. It springs from an estate-in-fee-giving quality, or an estate-for-life or an estate-for-years-giving quality,

which resides in the party who is clothed with the right or interest. As (in the scholastic philosophy) a house was burnt by fire, or a block split by a wedge, through a certain house-burning quality, or a certain block-splitting quality, which inhered in the fire or the wedge. It is pertinently asked by Thibaut, who, with his usual perspicacity, detects the absurdity of the definition, wherein the inlying quality of a husband or guardian can consist, unless it consists in the fact of the marriage, or in the acceptance by the guardian of the proffered wardship?⁸⁷ And if the marriage or acceptance constitute an occult quality inhering or lying in the husband or guardian, must not a similar quality reside in every party, who, by a contract, or by any other fact, acquires any right, or is subjected to any duty.

The supposition that a *status* is a quality inhering in the party who bears it, has every fault which can possibly belong to a figment. The supposed quality is merely fictitious. And, admitting the fiction, it will not serve to characterise the object, for the purpose of distinguishing which, the fictitious quality was devised.

It is remarkable that Bentham (who has cleared the moral sciences from loads of the like rubbish) adopts this occult quality under a different name. In the chapter in the *Traité de Législation*, which treats of *États* (or of *status* or conditions), he defines a *status* thus: 'Un état domestique ou civil n'est qu'une base idéale, autour de laquelle se rangent des droits et des devoirs, et quelquefois des incapacités.'⁸⁸

Now this *base idéale* (which is distinct from the rights or duties constituting the condition, and also from the fact or event by which the condition is engendered) is clearly the fictitious quality (expressed in another shape) which, according to the scholastic jurists, forms the *status*.

And the error is the more remarkable, inasmuch as Bentham in the next sentence but one, tells us, with perfect correctness, that 'connaître un état, c'est connaître séparément les droits et les devoirs qui y sont réunis:' implying that a *status* or condition is nothing fictitious or ideal, but a lot of rights or duties marked

⁸⁷ Der Begriff vom Statu (sensu stricto) ist so vag, dass er allen Unterschied zwischen *jus personarum* und *rerum* aufhebt. Wodurch entsteht die Qualität, dass jemand Tutor, Magistrat, oder Ehemann ist! Doch durch nichts anders, als dadurch, dass er die Würde und Tutel übernimmt, und die Ehe schliesst. Ist diess mehr in der Person liegende Qualität, als wenn ich mich durch einen Vertrag

anheischig mache, ein Mandat zu übernehmen! als wenn ich erkläre, ein Erbschaft haben zu wollen u. s. w. ?—Thibaut, *Versuche*, vol. ii. p. 19.

⁸⁸ *État*: A collective name for the actual and possible rights and obligations of some given person, and for such incapacities and exemptions as he may lie under or enjoy.—*Marginal Note in Bentham, Traité, etc.* vol. i. p. 294.

by a collective name, and bound by that name into a complex aggregate.

I will briefly remark, before I proceed to the next topic, that the *status* consists of the peculiar *rights* or *duties* (or the peculiar *capacities* or *incapacities*), and not of the *fact* or *event* which is mediately or immediately their legal cause or antecedent. For example: The peculiar rights and duties of husband and wife, and not the marriage from which they arise, constitute the correlating conditions borne by the two parties.

The absurd definitions of *status* which I have examined, probably arose from neglect of the very obvious truth which I now have suggested.

Through an ellipsis (or an abridged form of expression) we ascribe the rights or duties which constitute a *status* (not to the fact or event which engendered the *status*, but) to the very *status* of which they are constituent elements. We talk, for example, of an action *ex statu*, or of a right of action founded on a *status*; meaning in truth (if we speak with a determinate meaning) a right of action arising from the fact by which the *status* was begotten. For the right of action being parcel of the *status*, is not the legal consequence of the *status* itself, but (with the rest of the *status* of which it is parcel) is the legal consequence of the fact from which the *status* arises.

The authors, therefore, of the absurd definitions in question naturally reasoned thus: 'The fact or event from which a *status* arises, is not the *status* itself. Nor is *status*, *conditio*, or *persona*, a collective name for an aggregate of rights or duties: inasmuch as rights or duties are styled "*ex statu*," or are said to be consequences of *status*. Consequently, there must be a *tertium quid* (distinct from the fact, on the one hand; and from the rights or duties, on the other), of which those rights or duties are products or effects. But what is that *tertium quid*? Why, clearly, an occult quality lying or inhering in the person by whom the *status* or *person* is said to be borne or sustained.'

I will also remark, before I proceed to the next topic, that the rights or duties which are constituted elements of a *status*, are of two kinds. 1°. Those which arise solely from the very fact or event by which the party was invested with the condition. 2°. Those which arise from the fact or event coupled with another and a subordinate fact or event. For example: The right of the husband or wife to the *consortium* or company of the other (either against the other, or against third persons or

strangers), is a right which arises solely from the mere fact of the marriage. But a right or interest of either in goods or land acquired by the other, is the joint result of the *causa* or fact by which the goods or land were acquired, and of the marriage itself. From that acquisitive fact, the right of the husband or wife in the goods or land arises: By virtue of the marriage, that right or interest is so modified, that a right or interest in the same subject accrues to the other of the two parties.

Rights or duties which arise solely from the fact engendering the condition, are said to arise *ex statu immediatè*. Those which arise from the fact engendering the condition coupled with another and subordinate fact, are said to arise *ex statu mediatè*. The latter are also said to arise from those *capacities* or *abilities* which are immediate consequences of the fact engendering the condition. For without the intervention of the particular and subordinate fact, the fact engendering the condition does not engender the particular right or duty: It merely engenders a capacity or ability to take or incur a right or duty of the kind, in case a particular or subordinate fact of the kind shall happen to intervene. For example: By the marriage, the husband (according to the law of England) is clothed with a *capacity* or *ability* to acquire *choses in action* belonging to the wife. But, in order that he may really acquire, in pursuance of that capacity or ability, two particular facts, subordinate to the fact of the marriage, must necessarily intervene: namely, the acquisition by the wife of a *chose in action*, and the reduction into possession by the husband of that same *chose in action*.

Rights which arise solely from the fact engendering a condition (or rights which arise *ex statu immediatè*), are closely analogous (as I shall shew in my next lecture) to the rights which are styled by Blackstone '*absolute* rights,' and which are styled commonly '*natural* or *innate* rights.'

The only difference between them is this: The former are rights which arise solely from the fact engendering a condition: the latter are rights which arise solely from the fact of the party who bears them being under the protection of the state. By some writers, accordingly, *absolute* rights, or *natural* or *innate* rights, are styled, aptly enough, '*rights arising sine speciali titulo*.' The only objection to the phrase is this: that it applies to rights arising *ex statu immediatè*, as well as to those more general (and, indeed, universal) rights, which are styled *natural* or *inborn*.

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definition :
'Consequences of
the same
investitive fact'
(Bentham).

examined, a *status* is an *occult quality* inhering in the person who bears it : Or it is an *ideal basis* on which the rights or duties, capacities or incapacities, really constituting the *status*, rest or repose.

In the chapter in the *Traité de Législation*, which treats of *États* (or of *status* or conditions), there is the following passage :

Having said very truly, that '*connaître un état, c'est connaître séparément les droits et les devoirs qui y sont réunis*,' Bentham goes on to ask, '*mais quel est le principe d'union qui les ressemble, pour en faire la chose factice qu'on appelle un état ou une condition ?*' And to the question which he thus suggests, he gives the following answer : '*C'est l'identité de l'événement investitif, par rapport à la possession de cet état.*'

It may (I think) be inferred from this answer, that, in Bentham's opinion, the following are the *tests*, or *distinguishing marks*, of a *status*, condition, or person.

1. A *status* is a *set* or *collection* of *various* rights or duties, or of various capacities or incapacities to take or incur rights or duties. 2. The rights or duties which are its constituent elements, are legal effects or consequences of *one* investitive fact, of *one* title or mode of acquisition, or (in the usual language of the Roman lawyers) of *one causa* or antecedent. It is the fact of their springing from a *common* source, or the fact of their arising in common from *one* antecedent or *causa*, which makes them the collective whole, or the complex aggregate, styled a *status* or condition.

Now it certainly is true, that a *status* is a *set* or *collection* of *various* rights or duties. And it certainly is also true, that the rights or duties which are its constituent elements, are legal effects or consequences, mediately or immediately, of one and the same title or investitive fact or event. The *status*, for example, of husband or wife, is a set or collection of various rights and duties, and various capacities and incapacities : All which rights and duties, capacities and incapacities arise from the *status*, *mediatè* or *immediatè* : that is to say, they arise, mediately or immediately, from the *one* fact of the marriage, or from the *one* title or *causa* by which the *status* is engendered.

But though these two properties belong to every *status*, they are not *tests* or *characters* of a *status*, or will not distinguish *status* or conditions from those rights and duties which are matter for the Law of Things.

For, first, these properties belong to every of the aggregates which are styled by modern civilians *universitates juris* : that is

to say, complex sets or collections of rights or duties. And though every *status* (which is not purely burthensome) may be deemed a *universitas juris*, there are many of these universities which are not esteemed *status*; but are always inserted (and, I think, properly) in that general department of the law which is styled the Law of Things.

The aggregate, for example, of the rights and duties which passes by testament or intestacy to the general representative of a deceased person, has never been deemed a *status* or condition, but has always been considered as part and parcel of the bulk of the legal system. In the institutional writings of the Roman lawyers, in the French and Prussian codes, and in every systematic code (or every systematic exposition of a *corpus juris*) of which I have any knowledge, the rights and duties of heirs (or of universal successors to deceased persons) are placed in the *jus rerum* and not in the *jus personarum*. And by our own Hale and Blackstone (the only systematic expositors of our own *corpus juris*), the rights and duties of the executor and administrator (who are properly the *hæres testamentarius* and the *hæres legitimus* of the Roman Law) are inserted in the general department which they style *the rights of things*, and not in the special and exceptional department which they style *the rights of persons*. By Hale, indeed, in his analysis of the law, the rights and duties of the heir (who, in some respects, though not in all, is *successor universalis*) are placed, inconsistently enough, in the Law of Persons, as well as in the Law of Things.

Now the aggregate of rights and duties, which devolves by testament or intestacy to the general representative of a deceased person, has both the properties (although it never is deemed a *status* or condition) by which, in Bentham's opinion, a *status* or condition is characterised. For it is a *set* or *collection* of various rights and duties (and a set or collection extremely complex or composite). And the rights and duties which are its constituent elements, are consequences, mediately and immediately, of *one* and the *same* title: namely, of the testament, and the acceptance of the heritage by the testamentary heir or representative; or of the complex title, or complex mode of acquisition, by which the heritage, in the case of intestacy, passes to the legitimate successor.

And, secondly, the two properties, which, in Mr. Bentham's opinion, characterise a *status* or condition, are not even peculiar to those aggregates of rights and duties which are styled by modern civilians *universitates juris*. They are found in most or many of those numerous rights or duties, which, as contra-

distinguished to *universities* of rights and duties, are deemed *particular* or *singular*. For, as I shall shew hereafter, the difference between a university or complex aggregate of rights or duties, and a right or duty deemed *particular* or *singular*, is not a difference which can be described precisely, but is one of the vague differences which are styled *differences of degree*.

Most rights and duties are not in strictness *singular*, but are complexions or aggregates of elementary rights and duties. And the difference between a right or duty deemed *singular*, and a so-called *university* of rights and duties, merely lies in this : that the former is a less complex, and the latter a more complex lot.

Take, for example, a right, always esteemed *singular*, which is not the most complex of rights of that description : namely, the right of dominion or property in a specifically determined thing : as, a horse, a slave, a garment, a house, a field, or what not. It is manifest that the right, though deemed *singular*, is truly a collection or aggregate of rights of which an adequate description would occupy a bulky volume. It consists, for example, of the right of exclusive user or possession ; of the right of disposing or aliening totally or partially ; of rights of vindication, and other rights of action, in the event of a disturbance of any of those primary rights : Each of which rights, constituting the right of dominion, may itself be resolved into other rights which are less complex or composite.

Suppose that the thing, which is the subject of the right of dominion, is also pledged or mortgaged, and you get at a right in the mortgagor or mortgagee which is more complex still. For each has *jus in rem*, not less complex than the simple right of dominion, coupled with rights *in personam* availing against the other. And yet this intricate right of the mortgagor or mortgagee, is deemed a *singular* or *particular* right, and not a *university* of rights.

The two properties which, in the opinion of Bentham, characterise a *status* or condition, are therefore found in most of the rights which are deemed *singular* or *particular* ; and which, in every code, and by every private expositor of a *corpus juris*, are placed in the general department styled the Law of Things. In the case of every right deemed *particular* or *singular* (excepting the elementary rights, which, in the last result, are the constituents of all others), the right, in truth, is not *particular* or *singular*, but like a *status* or condition, is a collection of various rights : which various rights, like the rights and duties that are con-

stituent elements of a condition, are consequences, mediately or immediately, of *one* title or antecedent.

I have remarked above, that the rights or duties which are constituent elements, of a *status*, are commonly divisible into two kinds: 1st, those which arise immediately or directly from the paramount and more general title which engenders the *status*: 2ndly, those which arise mediately from that paramount and more general title, through subordinate and more special titles.

And, at the first glance, I imagined that this was the distinguishing mark of a *status* or condition. But I am not sure, that *every* set of rights or duties, deemed a *status* or condition, is divisible in that manner. And I am quite sure, that universities of rights and duties not deemed conditions, with sets of rights or duties deemed particular or singular, *are* divisible in that manner: that is to say, some of the rights or duties composing the aggregate or set, arise immediately from a paramount and more general title by which the aggregate or set is itself engendered: whilst others arise mediately from that paramount and more general title, through subordinate and more special titles.

Third erroneous definition: *Status* constituted by the divisibility of the collection of rights and duties into those arising immediately from the title which engenders the aggregate, and those arising mediately from that title, through special titles.

For example: All the rights and duties of the English executor (who, as universal successor, has properly *juris universalitas*) arise in a certain sense, from *one* complex title: namely, the will and probate. But some of his rights and duties arise immediately and directly from that his paramount and more general title: whilst others are not engendered by that paramount and more general title without the intervention of secondary and more special titles. Such, for example, are rights arising from a contract into which the executor may enter, touching the effects of the testator; or a right of action arising from an injury done to him in his character of executor, and not arising from an injury done to the deceased.

And the rights which are constituent elements of the right of dominion or property (always deemed a singular or particular right) are divisible in the same manner. Some arise from the conveyance (or from the other title by which the dominion is acquired), immediately or directly. But others arise from the title by which the dominion is acquired, through the intervention of a secondary or more special title. For example: The right of dominion comprises (amongst numerous other rights) a right of vindication: that is to say, of restoration to the exercise of the right of dominion, if the exercise be prevented by eviction,

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Fourth
erroneous
definition :
Status con-
stituted by
jus in rem
in the com-
plexion or
aggregate
of rights.

or hindered by any disturbance. But before the right of vindication can completely accrue to the *dominus*, he must be evicted from the possession, or otherwise disturbed in the enjoyment.

A person clothed with a condition, or bearing a person or character, has *jus in rem* (or a right availing against the world at large) in the complexion or aggregate of the rights which are constituent elements of the *status*.

At first I imagined that this might distinguish a *status*, from the set of rights or duties which are not *status*. But, for various conclusive reasons, I am convinced that this *jus in rem* over the *status* itself is not a character or distinguishing mark by which we can determine what a *status* is.

The *jus in rem* over the aggregate of the rights which are constituent elements of a *status*, is therefore not a character, or a distinguishing mark by which we can distinguish *status* or conditions from the sets of rights or duties which are not *status* or conditions.

For, 1st, in purely onerous conditions, the mark is *not* to be found : a right to a burthen, or to vindicate the enjoyment of a burthen, being an absurdity.

And 2ndly, the mark *is* to be found in universities of rights, which have never been deemed conditions or *status*, but have been placed by common consent in the Law of Things. Such, for example, are the universities or complex aggregates of rights which reside in the universal successors to testators and intestates.

3rdly, I almost incline to think that the same mark may be found in many of the sets of rights which are deemed singular or particular. *E.g.* Right of dominion would seem to import a right in the set or collection of rights into which dominion may be analysed. When the owner vindicates his possession he reinstates himself in the enjoyment of many separate rights. And what more is done by an action *ex statu*, or by any other action founded on a *juris universitas*?

But to this consideration I must revert hereafter, and will not pursue it here.

Thibaut's
definition
of *status*
criticised.

In an excellent treatise on *Jus personarum et rerum*, which occurs in his '*Versuche*,' or Essays, Thibaut of Heidelberg states the import of the distinction in the following manner.⁶⁹

He says that the department of the *corpus juris* which is styled *jus personarum*, is concerned with the differences between persons : whilst that department of the *corpus juris* which is

⁶⁹ Thibaut, *Versuche*, etc. vol. ii. pp. 5, 6, 7, 9, 21.

styled *jus rerum*, is concerned with all other matters about which law is conversant, and more especially about things incorporeal, or about rights and duties. This account of the distinction accords exactly or nearly with that account of it which I gave in my last lecture.

But, I think, it will not enable us to determine with precision, the subject or matter of the law of persons.

When he says that this department is concerned with the differences between persons, he means by the term 'persons,' *homines*, or human beings, or he means *status* or conditions. If he means *status* or conditions, he is right in saying that the Law of Persons is concerned with differences between persons: for it is concerned with describing and distinguishing the various *status* or conditions. But this leaves the main difficulty untouched. For why are the sets of rights and duties, which are detached from the bulk of the legal system and styled *status* or conditions, so detached in preference to others? Or, in other words, what is the common mark which severs the so-called *status* from the sets of rights or duties which have not been treated as such?

And if he means by persons, *homines* or human beings, the same difficulty presents itself in a somewhat different form. It is manifest that those *differences between persons*, which occur in the science of jurisprudence (or those *classes of persons* which occur in the science of jurisprudence), are entirely founded on differences between the rights and duties, with and to which persons, as meaning men, are invested and subjected: or, what comes to the same thing, they are founded on those differences between the facts and circumstances touching or concerning persons, which make it necessary to determine differently certain of their rights and duties. Whence, for example, the *class* of infants, or the *difference* between infants and other classes of persons? Why, clearly from the rights, duties, and incapacities, which are peculiar to infants: or, what comes to exactly the same thing, from that youth and inexperience, incident to infancy, which renders it necessary to arm and protect infants with those peculiar rights, duties, and incapacities.

This is admitted by Thibaut himself: who says, 'The Law of Persons is concerned with differences between persons: not, however, absolutely; but only in so far as the differences between persons influence their rights and duties.'

Now, as I remarked in my last Lecture, there is no right residing in several persons, and no duty incumbent upon several

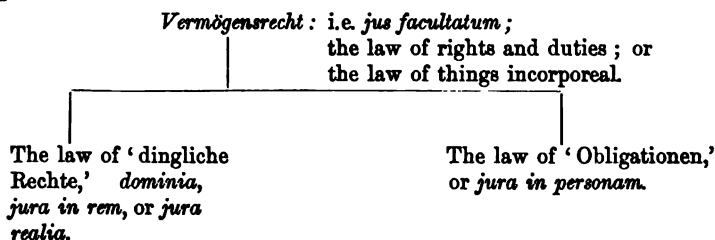
persons, which might not be made the basis of a class of persons. Every right or duty (excepting a right or duty peculiar to a specifically determined individual) might determine the persons clothed with it, or the persons subject to it, to a kind or sort. Insomuch that the possible classes of persons are as numerous as the possible differences between rights and duties.

Why, then, are only certain classes of persons made the subjects of the Law of Persons? Or (what is the same question put in another form), why are certain sets of rights and duties inserted in the Law of Conditions, whilst others are not deemed conditions, and are not detached from the bulk of the legal system?

Thibaut may probably mean, that the Law of Persons is not concerned properly with status or conditions, but only with the titles or facts by which *status* or conditions are invested and divested: the description of *status* or conditions, or of the rights or duties which are their constituent elements, being remitted to the Law of Things. This question, on which I touched in my last Lecture, I shall examine in my next.

NOTES.

For Savigny's conception of the order or method which is observed by Gaius and Justinian in treating the Law of Things, see *Vom Beruf*, etc. p. 66.



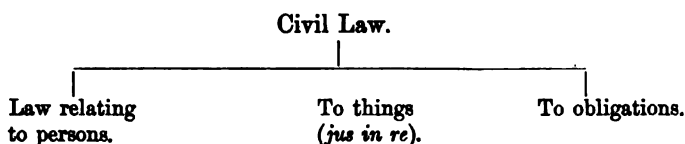
The two passages in his *Vom Beruf*, etc. pp. 98 and 66, are unfortunately the only parts of his works in which Savigny has intimated his opinion concerning the method of the Institutes.⁸⁰—See *ante*, p. 696.

The legal relations⁸¹ between private persons, apart from the

⁸⁰ These lectures were written before the publication by Savigny of his 'System des heutigen römischen Rechts,' in which this subject is discussed. See vol. i. § 59, p. 393.

⁸¹ The extract here made appears to have been intended by the author rather as a paraphrase of the passage in Falck, than an expression of his own views.—R. C.

political sanctions by which those relations are maintained, is the subject matter of Civil Law.



The consideration of these branches of Civil Law, should be preceded by a review of the various *Status* or Conditions: i.e. of the different *capacities* of different members of the society; or, in other words, of the varying clusters of rights and obligations of which they are severally *susceptible*.

Amongst the ancients the distinctions between the various conditions were much broader than amongst the moderns; with whom almost every legal incapacity is founded upon a corresponding physical one.

Of the various conditions or *status*, some are the creatures of government; others would exist without government; although the rights and obligations of which they severally consist would in that case be merely moral.

These various conditions constitute the subject-matter of the law which relates to persons; although it is more especially conversant with domestic or quasi-domestic conditions.—*Marginal Note in Falck*, p. 47, § 27.

Das Personen-Recht soll von den Verschiedenheiten der Personen handeln; aber natürlich nicht unbedingt, sondern nur sofern, als diess auf die Verschiedenheit der Rechte und Verbindlichkeiten Einfluss hat. Das Sachenrecht soll von Sachen handeln, und muss wieder in zwei Theile, Lehre von den körperlichen, und Lehre von den unkörperlichen Sachen, zerfallen. Zu dem letzten Theil gehört die ganze Materie von den Rechten und Verbindlichkeiten, weil diese Arten der unkörperlichen Sachen sind. Das Personen-Recht soll sich also mit allen dem Juristen wichtigen Verschiedenheiten der Personen, welche keine Rechte und Verbindlichkeiten sind, beschäftigen; das Sachenrecht mit Sachen, und besonders mit der Einen Art derselben, den Rechten und Verbindlichkeiten.—Thibaut, *Versuche über einzelne Theile der Theorie des Rechts*, vol. ii. p. 6.

LECTURE XLII.

STATUS FURTHER CONSIDERED.

IN the Lecture before the last, I explained or suggested the import of the distinction between the Law of Persons and the Law of Things: Meaning by 'the law of persons,' the law of *status* or conditions, or the law of persons as denoting *status* or

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conditions: And meaning by 'the law of things,' the bulk or mass of the *corpus juris* as abstracted from *status* or conditions, or the Law minus the law of *status*.

That such (stated generally) is the import of this celebrated distinction, appears from the short exposition of it which I then gave, and also from the passages from Savigny and Thibaut, which I read in my last lecture.

Having stated the import of the distinction in question, and adverted to the idea of *status* (which is the basis of the distinction), I proceeded to examine certain definitions of the distinction and of the implied idea of *status*, which in my opinion are erroneous or defective, and have engendered much of the obscurity wherein the idea and the distinction are involved.

I now proceed to a definition of *status* which, in my opinion, is not less erroneous than any of the various definitions that I examined in my last lecture.

Fifth
erroneous
definition :
Status a
capacity or
ability
(*facultas*
or *Rechts-*
fähigkeit).

According to the definition of a *status*,⁹² to which I am now adverting, a *status* is a *capacity* or *faculty*: for in the language of modern Civilians (and of all modern jurists whose terms are fashioned on the language of modern Civilians), the term *faculty*, though commonly denoting a *right*, also signifies a *capacity*, or *ability* to take or acquire a *right*, or to incur, or become subject to, a *duty*. In the language of the German jurists, who adopt the definition of a *status* to which I now am adverting, a *status* is denominated *Rechtsfähigkeit*: literally, or strictly, a capacity or ability to take or acquire a *right*; but meaning a capacity or ability to take or acquire a *right*, or to incur, or become subject to, a *duty*. For, amongst the numerous ambiguities by which the German '*Recht*' (like the Latin '*jus*') is perplexed and obscured, is this: that though it signifies a *right*, it occasionally embraces in its comprehension, a *duty*. For example: to succeed 'in omne *jus* defuncti,' is to succeed, by universal succession, or *per universitatem*, to all the descendible duties, as well as to all the descendible rights, of the deceased testator or intestate.

A capacity
or ability.

Before I remark on the falsity of the definition to which I now am adverting, I will briefly consider the nature of a *capacity*, or, as Hale and others of our writers also style it, *an ability*.

A person is *capable* of a given right, or is *capable* of a given duty, if, on the happening of a given event, the law would invest the person with that given right, or would impose on the person that given duty. A person is *incapable* of the given right

⁹² Namely, that contained in Thibaut's '*System*,' vol. i. p. 160, § 207.

or duty, if on the happening of the given event, the law would not invest him with the given right, or would not impose upon him the given duty. A slave, for example, is incapable of acquiring property, by conveyance for valuable consideration, free gift, descent, or otherwise. A freeman is capable of acquiring that right, by those or other means. An alien, by the law of England, is incapable of taking land by conveyance for valuable consideration, or otherwise. A native is capable of acquiring it, by that, and other modes of acquisition. An adult, speaking generally, is capable of incurring a duty, through an agreement to which he is a party. An infant, speaking generally, is incapable of incurring a duty, through an agreement to which he is a party.

It is manifest that the terms *capable* and *incapable* must be taken with relation to the given investitive fact, as well as to the given right or given duty. For a person incapable on one event, of a given right or duty, may be capable of the right or duty on the happening of another. We may conceive, for example, that an infant though incapable of binding himself by a naked contract, might be capable of binding himself by a contract of the same kind, if, to prevent fraud, it were clothed with certain solemnities. Though incapable of incurring a given duty by the contract alone, he yet might be capable of incurring that very same duty, by that very same contract coupled with other incidents.

The term *capacity* or *incapacity* is the abstract of the term *capable* or *incapable*. To have a capacity, is to be capable; and to be capable, is to have a capacity. Although a capacity is not of itself a right, a person may have a *right in a capacity to acquire a right*. Certain *status*, for example, are partly composed of capacities to take rights, as well as of actual rights: as others are composed, wholly or in part, of incapacities to acquire. Now, by the modes, direct or oblique, to which I adverted in my last Lecture, a person may assert or vindicate a *status* of the former kind, or may repel a *status* of the latter. In either of which cases he reinstates himself in certain capacities as well as in certain rights. A person, for example, who is unlawfully treated as a slave, may repel the *status* of slave by an action, and so recover the capacities which belong to him as a freeman.

And here I would remark, that the term capacity or ability, or incapacity or inability, can hardly be used, with perfect propriety, in relation to a duty. A *capacity or incapacity to incur or become subject to a duty*, certainly sounds harshly.

Consulting mere propriety of speech, I should rather style it *liability* to a duty, or *exemption* from a duty. But I use the term in relation to a duty, as well as in relation to a right, for the sake of the conciseness which thence results. You will find on making the experiment, that, if you use one name for a capacity to take a right, and another name for a capacity to incur a duty, you will often be forced to express yourself, when speaking of the capacities jointly, in sentences of suffocating length. And in giving to 'capacity,' the common or generic meaning with which I employ the term, I am justified by the similar use of the equivalent term 'faculty,' which is made, as will appear immediately, by authors of good repute.

A similar difficulty arises with regard to the term 'title,' and the term 'mode of acquisition.' We can hardly say, with propriety, that a duty arises from a *title*, or that a duty is *acquired*. But yet we want a name for those facts or events to which duties or obligations are annexed by the law. For we may have occasion to speak of the origin of a relative duty, as abstracted from the origin of the corresponding right: not to mention, that many duties are absolute. To obviate this difficulty, Bentham adopts the term 'investitive fact or event,' and uses it as a common or generic expression: that is to say, as denoting *any* fact, to which the law annexes a right *or* duty. Perhaps he would have done better, if he had ventured to use 'title' in the same generic sense, or had adopted the '*causa*' of the Roman Lawyers.

It is doubtful whether more uncertainty does not arise from the introduction of new terms, the meaning of which, of course, will not for some time be understood, than from the employment of established terms however ambiguous; and whether the writer himself does not, from want of familiarity with his own terms, incur considerable risk of using them ambiguously. I prefer to adhere to the established terms, and in the pithy language of Hobbes *snuff* them with apt distinctions and definitions, and when, being snuffed, they give light, then to use them.

Subject of
a right.

As not unconnected with the present matter, I will here make a remark, which may be very convenient to those who may happen to look into German books in anywise concerning law.

When I speak of the subject *of* a right, I mean not the person in whom the right resides, but the thing (strictly so called), or the person, over, in, or to which, the person entitled has the right: Supposing (I mean) that the right be one of the rights which are rights to things or persons. For an *obligatio*, or *jus*

in personam, is not a right to a thing or person, but to acts or forbearances *from* a person: And even many of the rights which avail against the world at large, are not rights to persons or things, but merely rights to forbearances from persons generally.

But in the language of the German jurists the *subject* of a right, is the person who has the right, or in whom it resides. And they employ the term *subject* in the same manner, not only with regard to rights, but with regard to duties, capacities, and incapacities. In their language, the party who has the capacity, or who lies under the duty or incapacity, is the *subject* of the same.

For various reasons it appears to me, that my own use of the term is the usual one, and is justified by many analogies. With these reasons, I will not trouble you. But I will add to the explanation which I now have given, that this their use of the term *subject* partly accounts for an absurdity of theirs to which I have alluded in my published lectures.⁹³

Now I think it extremely probable, that they were led into this strange jargon by that use of the term *subject* to which I have referred. Inasmuch as the person having a right, is the *subject* of the right, the term *Recht*, as meaning a right, must (they fancied) have something to do with the *subjectivity* of Kant: And, of course, the opposed *Recht*, which means *law*, must also (they fancied) have something to do with that *objectivity* which Kant contradistinguishes to *subjectivity*.

It is manifest that the terms are completely misapplied. In the Kantian language, *subjective* existences are either parcel of the understanding, or ideas which the understanding knows by itself alone. They are pretty nearly, if not exactly, the 'ideas gotten by reflection' which are opposed by Locke to 'ideas gotten by sensation.' And in the language of Kant, that exists *objectively*, which lies without the understanding, or which the understanding knows by looking beyond itself.

Now, admitting all this jargon, it is clear that the two terms, *objective* and *subjective*, are not applicable respectively to *law* and *rights*. For, though a right *resides* in the person, and so may be analogous to subjects of consciousness, most of that which a right necessarily implies, is, as to the person, *objective*. The law giving him the right (which according to themselves, is objective), together with the relative duty which the law imposes upon others, are not *in* him, or *parcel* of him, but are

⁹³ See p. 285, vol. i. *ante*.

as completely external to him, as an object of sensation is external to the percipient mind.

It is really lamentable that the instructive and admirable books which many of the German jurists have certainly produced, should be rendered inaccessible, or extremely difficult of access, by the thick coat of obscuring jargon with which they have wantonly incrustated their necessarily difficult science.

Status—
a capacity,
etc.

From this digression concerning capacities and incapacities, I revert to the definition of a *status*, which is the proper subject of the present examination.

According to that definition, a *status* or condition, or a person as meaning a *status* or condition, is a capacity or ability to take rights, or to incur or become subject to duties which the law confers or imposes upon the person, as meaning the *homo* or man. In Mühlenbruch's *Doctrina Pandectarum* the definition is given thus :

'Personam (quæ quidem a personando dicitur) potestatem juris vocamus; sive facultatem et jurium exercendorum et officiorum subeundorum, hominibus jure accommodatam et velut impositam. Ex quo intelligitur, quid sit, quod persona abjudicetur iis, qui aut prorsus nullo aut valde imperfecto gaudeant jure, etc.'⁹⁴

According to a definition of *jus personarum*, which is equivalent to the above definition of *persona* or *status*, the law of persons is concerned with the *capacities* of persons (as meaning men) to take rights or incur duties; or it is concerned with persons (as meaning men) in so far as they are *capable* of rights or duties.

This definition of *status* (with the equivalent definition of *jus personarum*) is liable to the following, amongst other objections.

1st. There are capacities which are common to *all* persons, who either completely, or to certain limited intents, are members of the given society political and independent, or subjects of its sovereign government. Every person, for example, whether free or slave, citizen or foreigner, adult or infant, married or unmarried, trader or not trader, has a capacity (unless he be excluded completely or nearly from all legal rights) to purchase and acquire property in such outward things as are necessary to the sustenance of life. Granting, then, that a condition is a capacity, its being a capacity will not serve to

⁹⁴ Mühl. vol. ii. p. 1.

characterise it; seeing that there are capacities which are not conditions. A condition regards specially persons of a given class, and cannot consist of aught which regards indifferently all or most classes.

2ndly. There are many conditions which consist mainly, not of capacities, but of *incapacities*. The condition, for example, of the slave, consists mainly of incapacities to take rights: The condition of the infant freeman, of incapacities (mainly or wholly imposed upon him for his own benefit) to take certain rights, and incur certain duties. Nay, there are, I believe, conditions (though I cannot recollect, at the moment, a condition of the kind) which consist *entirely* of disabilities: of incapacities to acquire certain rights of which persons generally are capable; or of exemptions from certain duties to which persons generally are liable.

3rdly. As I remarked in my last Lecture, and shall explain a little more fully hereafter, the rights or duties, which as well as capacities or incapacities, are of the constituent elements of most conditions, are divisible into two kinds: namely, rights or duties which arise from the *status immediatè*, and rights or duties which arise from the *status mediatè*. In other words of the rights or duties which are constituent elements of the condition, some arise solely and directly from the general and paramount fact which engenders the condition: whilst others arise from that general and paramount fact, through a particular and subordinate fact. For example: the right of the husband or wife to the *consortium* or company of the other (either as against the other, or as against third persons generally) arises directly and exclusively from that fact of the marriage which clothed the husband and wife with their several but correlating *status*. But a right or interest of either in goods acquired by the other, arises from the fact of the marriage, through the title or *causa* by which the goods are acquired.

Now the rights or duties which arise from the *status mediately* (or from the fact engendering the *status*, through a subordinate fact), are consequences of *capacities* which are parcel of the *status*, and which arise directly from the fact engendering the *status*. But the rights or duties which arise from the *status immediatè* (or which arise directly from the fact engendering the *status*), are *rights* or *duties*, and not *capacities* or faculties '*jurium exercendorum et officiorum subeundorum*.'—Wherever, therefore, the constituents of a *status*, are divisible in the manner which I have now suggested (and the constituents of

most *status* are so divisible), the *status* is not a capacity, or a bundle of capacities, but an aggregate of rights or duties *with* capacities.

*Tria
capita.*

I remarked in a former lecture, that there are certain pre-eminent *status* which the Roman lawyers seem to have distinguished from others by the name of *capita*: namely, 1st, *status libertatis* (or the condition of the freeman, as opposed to that of the slave); secondly, *status civitatis* (or the condition of the Roman citizen, as opposed to that of the foreigner): and, thirdly, *status familiæ*: that is to say, the condition of being a member of a given family, and as such enjoying certain rights, or being capable of certain rights. For example: Unless a person were a member of a given family, he could not take by succession *ab intestato* from any member of that family. And, by consequence, when a man was adopted by the head of another family, or when a woman married and thereby became a member of her husband's family, the *status familiæ* (with reference to the family quitted) was lost: though a new *status familiæ* (in reference to the family entered) was at the same time acquired.

Now a definition of *caput* (resembling the definition of *status* which I have just examined) is given by many German civilians. They say that a *caput* is a condition precedent (*Bedingung*) to the acquisition of rights: which merely means (if it mean anything) that a *caput* comprises capacities to acquire rights.—The definition, therefore, is liable to one of the objections which I made to the definition of a *status* that I have just examined. A *caput*, indeed, comprises capacities; and, in so far as it comprises them, is a condition precedent to the acquisition of rights. But it comprises rights and duties arising from the *status immediatè*, as well as mere capacities to take and incur rights and duties on the happening of particular and subordinate facts.

I remarked, in a former Lecture (when explaining the various meanings of the term *person*, page 351 *ante*), that a certain absurd definition of the term *person* arose from a confusion of *caput* and *status*: from a supposition that the Roman lawyers limited the term *status* to those peculiar *status* which they called *capita*. I remarked that those three *status* were probably called *capita* (or capital or principal *status*), because they comprised extremely numerous and important rights and capacities; and because the want of them implied extremely numerous and important incapacities.

Unless, for example, a man was free (or had the *status libertatis*), he was excluded from all rights, and was only subject and liable to duties. Unless he was a Roman citizen, he was excluded very generally from rights, though not from all. Unless he was an *agnat* of a given family, he was excluded, in regard to that family, from the weighty right of succeeding to its members *ab intestato*.

But that the Roman lawyers limited the term *status* to these three *capita*, is utterly and palpably false. They speak, for example, of the *status* of a slave who had not, and could not have *caput*: the want of liberty implying a want of citizenship, and also of relationship to a family of Roman citizens. They also speak of the *status* of a *peregrinus* or foreigner: of the *status* of a senator: of the *status lesæ existimationis*, or of a *status* consisting of certain incapacities consequent on having been noted or branded by the censors. In a note upon *status* which I have appended to my second Table, I refer to various places in the Institutes and Digests, wherein the term *status* is applied to many sets of rights or duties, or capacities or incapacities, which could not have been deemed *status*, if the term had been restricted to *capita*.

But there is one consideration which is quite conclusive. In the first book of Gaius' and Justinian's Institutes, *peregrini* or foreigners, *libertini* or freedmen, masters and slaves, fathers and children, husbands and wives, guardians and wards, with other classes of persons, are passed in review: And to the whole book, regarding specially these various classes of persons, the common title of *de personis* (and in Gaius, the title of *de conditione hominum* also) is prefixed.⁹⁵

Before I dismiss this subject, I would remark, that the *tria capita* are not properly *status*.

To describe the rights, etc. of a freeman and citizen, is to describe generally the matter of the Law of Things. For a freeman and citizen (except in so far as he is excluded by special incapacities) is capable of the rights and duties with which the Law of Things is properly concerned. To put the rights and duties of a freeman and citizen into the Law of Persons, were to repeat under a head of the Law of Persons the whole matter of the contradistinguished department.

You will find, accordingly (if you examine any systematic code, or systematic exposition of a *codex juris*), that, although

⁹⁵ Inst. i. 3. Gaii Comm. i. § 8.

freemen and citizens are distinguished from slaves and strangers, their rights and duties are not considered in the Law of Persons. Their rights and duties are defined negatively by the definitions of the incapacities which are incumbent on slaves and foreigners. If a man be free and a citizen, he is capable (speaking generally) of all the rights and duties of which a slave and foreigner is incapable, and also of all others contained in the Law of Things.

If you look into the tenth chapter of his first book (entitled 'Of the People, whether Aliens, Denizens, or Natives') you will find that Sir William Blackstone passes over the rights of native-born subjects '*as being the principal subject of his whole treatise*:' though he considers the incapacities of aliens, inasmuch as they regard specially a comparatively narrow class, and therefore are fit matter for that exceptional department which is styled the Law of Persons.

I apprehend, therefore, that the rights, etc. of a freeman and citizen are not properly a *status*: meaning by a *status* (the only meaning which I can possibly attach to it), a set of rights and duties, specially regarding persons of a given class, which for the sake of a convenient arrangement, it is expedient to detach from the body of the legal system.

It cannot, however, be inferred from what I have now said, that the Law of Things contains the rights, etc. of a citizen and freeman: or, in other words, that it relates to the *status* of a citizen and freeman. For a citizen and freeman may bear many *status* which consist of rights or incapacities peculiar to certain classes of citizens. An infant citizen, for example, or a citizen who is guardian, is clothed with peculiar rights besides those which are matter for the Law of Things, and is subject to peculiar incapacities which disable him from taking some of the rights with which the Law of Things is concerned.

A mistake similar to that against which I have offered this caution, is made by M. Blondeau (the Doyen of the Faculty of Law at Paris) in his excellent Analytical Tables of the Roman Law. He divides the *corpus juris* into law concerning '*capables*,' and law concerning '*incapables*:' meaning by a '*capable*,' a Roman citizen *sui juris* and not in wardship: and by '*incapables*,' all who are incapable of more or fewer of the rights of which a Roman citizen *sui juris* is capable. His law, therefore, of *capables*, is pretty nearly the Law of Things considered as an exposition of the rights, etc. of a freeman and citizen. But this division, though extremely specious, is false and defective.

There is no class of persons who are absolutely *capables*, although some are subject to fewer incapacities than others. Nor perhaps are there any who are absolutely *incapables*, although the incapacities of some are comparatively numerous.

It is also manifest that a Roman citizen *sui juris*, must bear many characters or many *status*: in respect of each of which he has peculiar rights and duties, or peculiar incapacities: as, for example, the character of magistrate, guardian, patrician, plebeian, etc. And how can these peculiarities find a place in a department which is concerned *generally* with Roman citizens *sui juris*?

As to the *status familiaris* the term *status* is not properly applied to it for another reason: because the peculiar rights of which it consists in every system or systematic exposition of law with which I am acquainted, are matter for the Law of Things. They relate to the law of succession, and cannot with any propriety be considered a *status*.

Before I quit this subject, I must remark on another obscuring distinction, which is a great obstacle to clearness of conception. This is the division of *status* or condition into *natural* and *civil*: or, as Heineccius has it, *status qui ex ipsa natura profisciscuntur, et status qui ex jure civili descendunt*.⁹⁶ These latter were the *tria capita* already mentioned. Now every *status* must be *civilis*; that is the creature of positive law: for it consists of rights and duties which positive law attaches to some given incident. Nor do the phrases suggest any intelligible distinction even as to the facts in which the *status* originates. To be twenty-one years of age is not more *natural* than to be born out of the community. The error arose from the confusion, already adverted to, of *status* and *caput*. It was first assumed that these terms were synonymous; then the term *status* was limited to the three so-called *status* which are *capita*, and these were called *status civiles*. But finding that there were other differences between persons which engendered things looking exceedingly like *status*, civilians called these, to distinguish them from the others, *status naturales*. This was perfectly gratuitous; the Roman lawyers said nothing about it, and called many other things *status* besides the three *capita*.

Having examined various definitions of the idea of *status*, and of the distinction founded on that idea, I will now offer a few suggestions which may perhaps conduct the hearer to their true nature.

The true nature of the idea of *status*, and of the distinction

⁹⁶ For entire passage see end of this Lecture.

LECT.
XLIII

between
jus person-
arum et
jus rerum
resug-
gested.

Though the rights, etc., which are constituent elements of a condition, are peculiar to the class invested with conditions of the kind, it is not true (*e converso*) that the rights, etc., which are matter for the Law of Things, are common to persons of all classes, or reside in or are incumbent upon all.

For example: All persons are not capable of being contractors, mortgagees or mortgagors, purchasers, etc. Nay, some *status* consist exclusively, or consist partly, in incapacities to take or incur the duties which are matter for the law of things.

When, therefore, I said in a former Lecture, that the Law of Things is to the Law of Persons, as the genus is to the species under it, the expression must be taken with the modification now suggested.

An expression more nearly approaching to the truth is this: that the rights, etc. which are matter of the Law of Things, must be taken into consideration before we can understand the rights, etc. which are constituent elements of any given *status*: Whereas, the rights, etc. which are constituent elements of any *status*, need not (generally speaking) be taken into consideration in order to an understanding of the Law of Things. They have no necessary currency with the bulk of the legal system, and may be detached from it without breaking its continuity. This is one principal reason for detaching it: for it does not break continuity, and renders the exposition of the bulk of the system more compact and coherent.

The first reason (namely, that the matter of the law of things must be taken into consideration in order to a right understanding of almost any *status*) will account for the difficulty which I suggested the other night, namely, that certain sets of rights and duties which would seem to regard specially comparatively narrow classes, are placed, nevertheless, in the Law of Things. They have such a coherency with the bulk of the legal system, that if they were detached from it, the requisite continuity in the statement or exposition of it would be lost.

Such, for example, is the bulk of the rights and duties devolving on the heirs of a deceased person. Though this *juris universitas* is not distinguishable from a *status*, yet if it were not placed in the Law of Things, the inconvenience would be incurred which I have already adverted to, since without an explanation of these rights, many rights of general interest and apparently of an elementary kind, could not be understood.

Or, again, A right of unlimited duration (as contradistin-

guished from one of limited duration), etc. could not be understood without an explanation of the law of succession.⁹⁷

It is true, then, generally, that the matter of the law of things must be taken into consideration, before we can understand the rights, etc. which are elements of any given *status*. Whereas, the matter of any *status* need not be taken into consideration, in order to an understanding of the Law of Things.

This last is, however, not true universally. For the matter of many sets of rights, etc. deemed *status*, must be taken into consideration partly, in order to an understanding of the Law of Persons. We cannot, for example, understand the law of succession without considering the law of marriage, because succession depends upon legitimacy. The truth is that each department contains *præcognoscenda* necessary to the other; but those contained in the Law of Things are incomparably the more weighty and numerous.

A consequence of this is that, in different arrangements of the *corpus juris*, the law is variously distributed between the two departments. Many sets of rights and duties which by some are reckoned *status* are by others included in the Law of Things. By many German expository writers, and by M. Blondeau, the law of husband and wife, parent and child, guardian and ward, and almost that of master and servant; all the domestic conditions, in short, are inserted in the Law of Things immediately before the law of succession, because the latter cannot be understood without adverting to them.⁹⁸

The arrangement is illogical in this particular case, because, though certain portions of the law relating to the domestic conditions must be known in order to understand the law of succession, there need only be certain *small* portions, and the balance therefore of convenience inclines to placing this department of law in the *jus personarum*; and convenience is the only consideration by which the expositor would be guided. Thus, for instance, the exposition of Procedure requires the consideration of the sovereign authority; but it would be absurd for this reason to insert an exposition of political *status* in the Law of Things immediately before the head of Procedure.

On the whole, the two principal reasons for detaching sets of rights, etc., from the body of the legal system seem to be,

1st. That the rights, etc. constituting the *status*, regard specially a comparatively narrow class of the community; and

⁹⁷ See note upon *status* in Table II. *sub fine*.

⁹⁸ Hugo, *Enc.* p. 74.

that it is convenient to have them got together for the use of that class.

2ndly. That they can be detached from the bulk of the system without breaking the continuity of the exposition. And that the so detaching them tends to give clearness and compactness to the exposition of the bulk of the law.

And therefore, if to state them would break much continuity of exposition, these rights are left in *jus rerum*, though specially regarding a narrower class.

Where the two conditions concur, the two objects which I pointed out in the last lecture are accomplished ; i.e. 1. assemblage of rights, etc. under a common head : 2. relief of general exposition from special matter. I will not say that these are the only reasons, but they are the principal.

In practice it has not been usual to detach them, although both conditions concur (i.e. though the rights be peculiar to a comparatively narrow class, and though detachable without breaking continuity) if the rights, etc. are few in number and unimportant.⁶⁰

But this is illogical and unsystematic. They ought to be detached, whether numerous or not, if they can be detached commodiously. Where a set of rights and duties, capacities and incapacities, specially affecting a narrow class of persons, is detached from the bulk of the legal system, and placed under a separate head for the convenience of exposition, that set of rights and duties, capacities and incapacities, is called a *status*. And this, it appears to me, is the whole rationale of the matter. Though, such is the pother made about *status*, that nothing but a most laborious inquiry into the subject could convince me that there was not more in it.

It is difficult to state the distinction, because it is a distinction suggested by considerations of arrangement, and therefore vague. But the distinction is not therefore useless, because not precise : and the same objection applies to most attempts at classification and arrangement.

It is important to explain it fully, on account of the extreme obscurity in which it has involved the science of jurisprudence.

This distinction, too, with that of *jus in rem* et *jus in personam* (or delicts and obligations) is the principal key to the necessary structure of Law.

I must here explain an apparent inconsistency. In my

⁶⁰ Blondeau, VII. XI.

Outline, I say that the idea of *status* is a necessary one; and I said the same in my last Lecture. And yet I say that a *status* has no certain mark, and that the distinction between *jus personarum* and *jus rerum* is merely adopted for the sake of a convenient arrangement.

My explanation is this: That the differences (though not perfectly precise) which suggested the distinction, do exist in every system.

In every system, there are rights, etc. which concern specially comparatively narrow classes, and which can be detached from the bulk of the system with little or no inconvenience.

In every system there are also rights, etc. of a more general interest, or which it were impossible to detach from the bulk of the system without breaking its coherence and continuity.

There are therefore reasons in every system for adopting the distinction, although it may not be described precisely alike in any two systems. That this is true, is proved by its almost universal adoption. It is also, I repeat, a strong presumption in its favour that Bentham by a sort of instinct has been led to a distinction identical with this which he treats with so much contempt; his division of the *corpus juris* into the general and the special codes coinciding in principle with the distinction between the Law of Things and the Law of Persons.

NOTES.

Blondeau's terms suppose that the persons whom he calls '*Incapables*' are distinguished from those whom he calls '*Capables*' only by incapacities.¹ But this is an error. *Both* are *capables* and *incapables*: each is *capable* (*i.e. would* acquire certain rights etc. and be *subject to certain obligations* etc. on the happening of certain incidents) of rights and obligations of which the other is *incapable*; and each is *incapable*, etc.—Capacity and Incapacity, therefore, cannot be made the basis of this distinction.

Excluding special and political *Status* as he does, the *Law of Capables* is with him equivalent to the *Law of Things*; for it includes all the rights, etc. which regard the other classes; and *patres-familias* (being considered apart from the modifications which special *status* etc. might work upon their private rights) may be said to be *capable* of *all* these rights. The division, however, in truth, is a division into *patres-familias*, and those who are not; *patres-familias*, in abstract, being *capable* of all etc.

The rights and obligations of capable persons are those which,

¹ See p. 718, *ante*.

though not *belonging to every status*, must be taken into consideration *with reference to every status*.

Besides, many of the elements of many *status* are not incapacities, but rights or powers not possessed by other classes: *e.g.* tutor or guardian, magistrate, etc.

Perhaps there is no man a 'Capable';—If by capable be meant a person invested with all the rights and capacities, and subject to all the obligations which are described, or ought to be described, under the Law of Things; certainly there is no one who is capable of *all* the rights and obligations which are described in both departments. It may be said of a man that he is not subject to *this or that* incapacity or *this or that* exemption; but it can hardly be said of him that he is free from all, or susceptible of none. In fine, *everybody belongs to some class*.

*Tria capita.*²

Quæritur itaque, Quid sit Status? Resp. Esse qualitatem, cujus ratione homines diverso jure utuntur, *e.g.* quia alio jure utitur liber homo, alio servus, alio civis, alio peregrinus; hinc libertas et civitas dicuntur status. Vocatur alias status in jure nostro, *caput*. Status Jurisconsultis duplex est, *naturalis et civilis*. Naturalis est, qui ab ipsâ naturâ proficiscitur, *e.g.* quod alii sint masculi, alii feminæ, alii nati, alii nascituri vel ventres. *Civilis* est qui ex jure civili descendit, uti differentia inter liberos et servos, cives et peregrinos, patres et filios-familias. Hinc *status civilis* triplex est; *libertatis*, secundum quam alii sunt liberi, alii sunt servi; *civitatis*, secundum quam alii cives, alii peregrini; et denique *familie*, secundum quam alii patres-familias, alii filii-familias. Jam ergo facile intelligitur axioma: quicumque nullo horum trium statuum gaudet, is non est *persona* secundum jus Romanum, *sed res, quamvis homo sit*.—Heineccius, *Recit.* p. 52.

Hominum jura civilia, quæcunque sunt, tribus hisce tanquam involucris continentur: libertate, civitate, familiâ, qui quidem *status* appellantur.—Mühlenbruch, *D. P.* vol. ii. § 214.

Die bürgerliche Rechtsfähigkeit ist das, was die Römer *caput* oder *status* nennen. Die Neueren nennen sie dagegen, verbunden mit allen durch die Gesetze erzeugten Eigenschaften, wovon einzelne Rechte abhängen, *status civilis*: die natürliche Rechtsfähigkeit hingegen, verbunden mit physischen Eigenschaften, welche besondere Rechtsverhältnisse zur Folge haben, *status naturalis*.—Thibaut, *System*, vol. i. § 3.

Bentham (misled by Blackstone and others) treats the distinction of *jus personarum et rerum* with great contempt; asking (and justly enough) how *things* can have rights, or what rights there *can* be

² See p. 716, *ante*.

which are not rights of persons? The truth is, that a distinction suggested by himself nearly tallies with the one which he rejects with disdain; or would tally with the latter, if the Roman lawyers had pursued the principle of the distinction consistently.—*Author's Note.*

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For Bentham's Method, see Table IX. (*post*).

LECTURE XLIII.

THE SAME SUBJECT CONTINUED.

HAVING endeavoured to settle the import of the distinction between *jus rerum* and *jus personarum*, and to define the notion of *status* or condition, on which that distinction is founded, I will now add a few remarks, supplementary to the lectures in which I have discussed this subject.

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Supplementary
remarks.

First then: It has been doubted whether the Roman lawyers intended to insert in the *jus personarum* the description of the rights duties capacities and incapacities of which *status* or conditions are comprised; or to confine themselves to the facts or events by which the *status* are invested and by which they are divested. The solution of this doubt is, that neither the Roman lawyers, nor those modern civilians who have adopted from them the distinction of *jus rerum* and *personarum*, conceived with perfect distinctness its purpose, nor did any of them in the detail of their writings pursue it consistently.

Both the Roman lawyers and Sir William Blackstone inconsistently inserted in the Law of Things many rights and duties manifestly arising *ex statu*: and the Roman lawyers in many cases inserted in the Law of Persons a description only of the event which engendered the *status*, and the events by which it was destroyed: not of the rights and duties of which it consisted. For instance, in the Law of Marriage, they inserted only the manner in which marriages were *contracted*, the different conditions of a *valid* marriage, and the modes in which marriage was dissolved. In the law of tutelage and guardianship, on the contrary, they inserted not only the modes in which the *status* was acquired or lost, but also the rights and duties which constituted it. They had in truth no distinct conception of their own purpose, and they therefore pursued it in the detail inconsistently.

Through blending, as they do, the two methods, they lose

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Jus actionum co-ordinated by the Roman lawyers with *jus rerum* and *jus personarum*. This is a logical blunder.

the advantage of the first ; keep the disadvantage of the second ; and add a difficulty of their own : i.e. that of obliging the seeker to look for the peculiarities of *status*, not only under the descriptions of the several rights and titles, but also under the (as by them treated) purposeless department of *jura personarum*.

The next remark which I have to make is more important. Roman lawyers divide law, in the first place, into *jus publicum* and *jus privatum* ; and in their institutional treatises they confine themselves principally to *jus privatum*. This they again divide into *jus personarum*, *jus rerum*, and *jus actionum*, including under this third head the law of civil procedure. This last distinction is also adopted in the Commentaries of Sir William Blackstone, whose object was more comprehensive, as he treats not only of what the Roman lawyers called private law, but also of what they comprised under the name of public law, namely, the law of political conditions ; criminal law ; and the law of criminal procedure. Both in the Roman lawyers and in Blackstone this division is grossly inconsistent ; it deviates from the object of the distinction between the Law of Things and the Law of Persons. For according to this arrangement *jus actionum*, instead of being considered as a species, is co-ordinated with the two genera. It is manifest that the law of injuries, whether civil injuries or criminal, and of the rights and duties arising from injuries, and the law of civil and criminal procedure, really consist of a variety of species belonging to those two genera, and should therefore not be co-ordinated with *jus personarum et rerum*, but distributed under both.³ All matter contained in these departments of law, which relates peculiarly to any of the classes of persons which have been put into the *jus personarum*, should be placed in that branch of the law. For example, under the *status* of an infant should be placed the description of crimes, civil injuries, civil and criminal procedure as modified by infancy. For example, an infant, in a great number of cases, is not liable criminally, and in a logical arrangement these exemptions would be placed in the *jus personarum*. When an infant sues or is sued, the situation of plaintiff or of defendant is filled by his guardian instead of *himself*. This is not properly matter for the *jus rerum* but for the *jus personarum*, under the head of infancy. All the *generalia* of the *jus actionum* should be left in the *jus rerum*, while those parts which have relation specially to particular classes of persons, and which can be detached from the bulk of the legal system without breaking its continuity, should be

³ Thibaut, *Versuche*, etc., vol. ii. pp. 8, 9, 19.

placed under the respective heads of the *jus personarum* to which they belong.

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The division therefore of the *corpus juris* into *jus personarum*, *jus rerum*, and *jus actionum* is a gross logical error. In Blackstone, the error is a consequence of his original division. For he does not, like the Roman lawyers, begin by dividing the law into *jus publicum* and *jus privatum*, and this last into *jus personarum* and *jus rerum*; but he divides the whole *corpus juris* into law regarding rights and law regarding wrongs. By law regarding rights, he means law regarding injuries, the rights and duties arising from injuries, and civil and criminal procedure. Having divided the *corpus juris* into these two divisions, and having then divided the first, or law regarding rights, into *jus personarum* and *jus rerum*, he could not include in either of these heads the law regarding actions. His division is illogical, it being manifest that the law regarding wrongs does not regard wrongs only, but rights also, namely, the rights which arise out of wrongs; as will be sufficiently evident to any one who looks through the third book of his Commentaries, and observes the matter of which it is composed.

Logical inaccuracy of Blackstone's division of the *corpus juris* into law regarding rights and law regarding wrongs.

The nature of the distinction between public and private law I shall advert to in my next Lecture; when I shall shew that it is as erroneous as this distinction of Blackstone's; and that public law is not one main half of the *corpus juris* which ought to be opposed to the other half, but a very small portion of it, which ought to be included in the Law of Persons as a subordinate member: and Blackstone, in imitation of Sir Matthew Hale, has so included it. I am now speaking of public law in its narrower acceptation, for in its larger, the whole of criminal law is included in it. Criminal law as a part of public law (*latius acceptum*) is excluded by the Roman jurists from Law of Persons and Law of Things. But it ought to be distributed under those two departments.

The next topic to which I shall advert is the order in which the Law of Things and the Law of Persons should stand relatively to each other. If my account of the *rationale* of the distinction is correct, the Law of Things ought to precede the Law of Persons; because the Law of Things is the law, *minus* the Law of Persons, while the Law of Persons contains such portions of the Law as relate to specific and narrow classes of persons, and can be detached from the body of the law without breaking its continuity. Consequently the general code should come first, and the comparatively miscellaneous matters, which are

The law of things should precede the law of persons in the *corpus juris*.

properly a sort of appendix, should come last. Accordingly, Sir Matthew Hale suggested, and Sir William Blackstone practically adopted, this order. It is, however, impossible to sever completely the *jus personarum* and the *jus rerum* from one another. Even the *jus personarum*, though consisting mainly of the narrower positions and rules which modify the more general matter comprising the *jus rerum*, yet contains many positions, which must be anticipated before it is possible to explain the Law of Things. But the number of the *præcognoscenda* in the Law of Things is incomparably greater than the number of those in the Law of Persons. Although the two departments can never be completely disengaged from one another, the student must begin somewhere: and he should begin where he will require fewest references to what is to come afterwards. This topic is not of very great importance; it regards chiefly the logical symmetry of the body of law.

Natural or
inborn
rights,
what!

I may immediately explain in this place the nature of certain rights, which have been confounded by mysterious jargon; namely, those which are called *natural* or *inborn*, and by Blackstone *absolute* rights. For his 'law regarding the rights of persons' is not the *jus personarum* of the Roman jurists; *their* *jus personarum* is only one species of his law regarding the rights of persons, a species which he calls 'law regarding the *relative* rights of persons'; as contradistinguished from another species, namely, law regarding the *absolute* rights of persons, that is, these *natural* or *inborn* rights.

I have already observed, that the rights or duties constitutive of *status* arise in two ways: they arise *ex statu immediate*, either directly from the general or paramount title which engenders *status*; or from that general title through some subordinate title. The distinction between *natural* or *inborn* rights and any other rights is analogous to this.

Natural or *inborn* rights are those which reside in a party merely as living under the protection of the state, or as being within the jurisdiction of the state; if the party have any rights whatever, which the Roman slave had not. Now these are exactly what Blackstone called *absolute* rights. Such, for instance, is the right of personal security: the most general of any. This right is called *natural* or *inborn* merely because it arises *sine speciali titulo*; that is, it resides in a party, merely as living under the protection or within the jurisdiction of the state; now this fact having no special name, the right seems to arise without any title, and therefore *ex lege immediate*; not

requiring to be annexed by the law to any investitive event whatever. I agree, however, with Thibaut that this is a mistake, and that rights are always annexed to some fact or other; but this fact has not received any concise name, nor is anywhere described.

Such then are these rights, and such the origin of the name. They are the most general of any: they reside in all who live under the protection of the state or within its jurisdiction, and reside in them by reason of their living under its protection: and are called natural or inborn rights, because there is no precise fact, bearing a concise name, to which they are annexed by the law. It is manifest that they are not natural or inborn; for they are as much the creatures of the law, as any other legal rights.

Although the term is applied to rights only, it is equally applicable to many duties. There are many duties to which a person is subjected merely by reason of his being under the protection of the state, or being altogether, or to certain limited purposes, a subject of the state. Such, for instance, are duties towards the government itself; the duty of abstaining from any act of resistance, of abstaining from any act of tumult, and so on. These duties are as properly natural or inborn, as the rights which are so-called.

Blackstone here runs into a signal confusion of ideas, for he opposes these natural or inborn rights, by the name of absolute rights, to what he calls the relative rights of persons. But there are no such things as absolute rights: all rights are relative; they suppose duties incumbent on other persons. He defines these absolute rights to be rights appertaining to them merely as individuals or single persons. But I cannot conceive how they can be distinguished by *that*. All or most rights must belong to particular persons, and must belong to them *as* particular persons. *Dominium*, for instance, and all rights arising from contracts, come under this description. He further defines them, rights which would belong to persons in a state of nature; rights which they would be entitled to enjoy either in or out of society. But many other rights are in the same predicament. Contracts, for instance, or at least conventions, must have preceded society; or it is difficult to see how society could have arisen. No legal right, indeed, would in a state of nature be engendered by a convention, but a moral right would; which would be as completely a right as those mentioned by Blackstone. And as to *legal* rights, with which alone Blackstone was properly concerned, they, it is obvious, can only belong to a man in society.

Gross absurdities of Blackstone on this subject.

Amongst others of these absurdities, Blackstone instances, as an absolute right, the right of private property! A right which, it is quite obvious, cannot exist out of a state of society; and which is indeed the main object of his second volume. The word *property* is a term of exceedingly complex meaning, comprising a vast variety of rights: and he himself includes under it all the rights over real and personal property, which are described in his second volume. I suppose he must here mean by the right of private property, not any particular rights of private property but capacities to take rights of private property. But even these do not properly fall under this head: for many such capacities do not belong to all persons, certain classes (as, for example, aliens) being excluded from them. He should have inserted only those rights which necessarily reside in every person who is subject to the state either generally or to any limited purpose, or who is within its jurisdiction.

Another error of Blackstone is that of putting those *absolute* rights of persons under the head Rights of Persons at all. As residing in *all* persons, these rights are not matter for the Law of Persons, but for the Law of Things; and by the Roman lawyers are so treated. The cause why this was overlooked by Blackstone seems to be that in this, as in other instances, the rights are not explained by the Roman lawyers directly, but only by implication, under the head of delicts; and the explanation nowhere else occurs.⁴

Order of Law of Things and Law of Persons.

Possible simplification. Implication of one *status* with every other, as well as of every *status* with *jus rerum* or the body of the system: e.g. a married infant, a husband-soldier, a married woman, a trader, etc. But unless the system be simplified, lawyers cannot understand all of it. And not understanding all, cannot have complete knowledge of any part. If it were accessible to all lawyers, expense and uncertainty would be mightily diminished.

[We have now no Lord Coke. His resemblance to Roman Lawyers.]

Queries as to the Outline of the Method.

[Should the Law of Things be preceded by an enumeration of the

⁴ This, according to J. S. M.'s notes, it stood in the last edition. These fragments, although less mature than the preceding matter, seem to be of some value, and are at least suggestive.—R. C.

several classes of persons? Or should this be prefixed to the Law of Persons, and only so much relative to *status* in general precede the former, as suffices to illustrate the distinction between these two grand divisions?]

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The Method pursued in the Law of Things should be pursued under each head of the Law of Persons. (See Outline.)

In treating of any *status* (whether generic or specific) the rights and obligations, etc. direct or correlated, which grow out of it [or make it up] must be considered in the order observed under the Law of Things; *i.e.* Primary rights, with their subdivisions of *jura in re*, *jura ad rem*, compounds of both *jura in universitatibus*, etc.; and violations of these primary rights and obligations, with the secondary or instrumental rights and obligations by which such violations are remedied or prevented.

Principles on which Rights and Obligations are to be referred to this or that Status.

The rights and obligations, capacities and incapacities, susceptibilities and exemptions, which belong to a certain class as *such* (whether such rights, etc. are originally rights, etc. of that *status*, or restorations of *jura rerum* in derogation of the rights, etc. of another *status* with which it is combined), must be considered together.

E.g.: All that relates to the *status* 'Infancy,' abstracted from any other *status*, must be considered together. All that relates to the *status* 'Trader' must also be considered together: including thereunder such *generic* rights and obligations as infants *when traders* enjoy or are subjected to, contrary to the general rules touching infancy.

In order to determine the status to which any given right with its correlating obligation shall belong, inquire (1°) whether the obligation exist for the sake of the right, or the right for the sake of the obligation: (2°) whether the right or the obligation (as the case may be) grow out of, or exist by reason of, any, and what, *status*. Having found that it exists as a consequence of the existence of such or such a class, treat the right with its correlating obligations, or the obligation with its correlating rights, as forming part of (or falling under) the *status* of that class.

Under any department of the Law of Persons are to be considered not only the rights and obligations peculiar to the *status*,

but also rights and obligations (generic or not) *not belonging to the status as modified by it.*

A Right or Obligation, how it arises out of this or that Status.

If a right, it has a correlated obligation imposed upon others. But inasmuch as this obligation exists for the sake of the right, and *that*, as we have shown, exists by reason of the *status*, it follows, that the obligation is also a consequence of the *status*, exists for the sake of it, and ought to be treated with it. The same reasoning is applicable to obligations, wherever they induce the consideration of their correlated rights though existing in others; also to exemptions and incapacities.

The principles which lead to the distribution of the whole matter of the law into 'Law of Persons and Law of Things,' must also determine the departments and subdepartments into which the Law of Persons should be divided, with the order of those departments and of their several subdepartments.

1st principle; Separation of that which is peculiar to certain classes.

Status divisible into (1°) those which (though they *may* attach upon *any*, or upon almost any) are *limited to a few*; and (2°) those which attach upon *every* one (at some time or other of his life), or which, if not universal, are very *widely spread*. Instances of the first genus; trades, professions, government offices, etc.: of the second genus; the various domestic conditions: of the first species of this second genus, infancy, and the filial condition: of the second species of the same, marriage and paternity.

The second genus, as being *of more general application*, should precede the first.

2nd principle; From the less to the more composite: From those which (to be complete) suppose not the explication of other or many *status*, to those which suppose such explication. But quære if there be any such principle, *except in combination with the first*. For the modifications of the more general by the more special *status*, it is natural to look, not into the first but into the last: *e.g.* for 'Infant trader,' not under 'Infant,' but under 'Trader.' Inasmuch that 'trader' supposes an explication of infant.⁵

Wherein Status consists.

The peculiarities of *status* seem to consist: (1°) In rights,

Wherein
Status
consists.

⁵ Blackstone, vol. ii. p. 476.

obligations, and capacities peculiar to the class; whether such rights, etc. be *sui generis*, or only modifications of others. (2°) In peculiar incapacities. (3°) In peculiar conditions to be fulfilled or observed before incidents can have their usual effect: But these seem to come under the head of peculiar rights, obligations, etc., or incapacities; *i.e. conditional* rights, etc. or incapacities.

So that wherever a set of persons have rights, obligations, etc. peculiar to themselves; or are incapable of such as are common to many others, there is a *status*: or, in other words, the persons are determined to, or constitute a class.

Rights, obligations (and capacities), which are not confined to one class, do not originate in *status*.

What it is that determines a Person to this or that Class, or what it is that makes the Class.

1°. The being clothed with actual rights and subject to actual obligations, peculiar to persons of the class; the being capable of investment with such peculiar rights, and of subjection to such peculiar objections; or the being incapable of certain rights and obligations of which persons of other classes generally are capable.

2°. Rights and duties *ex speciali titulo*, and rights and duties *immediatè ex statu*, or arising from the mere fact that the party is living under the jurisdiction of the Government.*

Generally speaking, a right or duty forming a constituent element of a condition has been preceded by two events: 1. The event investing the *status*. 2. A title specially investing the right or duty: *e.g.* the peculiar right of a married woman to land or goods.

This, however, is not true universally. There are rights or duties *ex statu immediatè*, or arising from the event investing the *status*, without the intervention of a special *titulus*. Such is the right *in rem* to the *status* itself. Such too is the right of the father to exact obedience from the child, and to punish in case of disobedience. Such too is the corresponding duty of the child to render obedience; The right of the child to support: Certain rights and duties of husband and wife, guardian and ward, master and slave.

There are rights and duties in or upon all, *sine speciali titulo*,

* See p. 728, *ante*. See Table II. note 5, *post*. Note in Outline about Public Law, pp. 70-72, vol. i. *ante*.

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arising from the mere fact of their being within the jurisdiction of the given sovereign government (unless special incapacity intervened). [*E.g.* Right to personal security, etc.]⁷ Such rights are called 'natural or inborn,' because, arising *sine speciali titulo*, there is no obvious investitive fact. But in truth, there is scarcely a right or duty *immediatè ex lege*. (Why called so, see Thibaut, *Jus in rem et in personam*.)

This applies to duties as well as to rights. There are many that might be deemed inborn rights besides those usually called such: *e.g.* capacity of an heir apparent or presumptive, or before *aditio* (in Roman law). Here there is no special *titulus*, but merely a general capacity to take a number of rights (merely on the happening of certain incidents).

A right, duty, capacity, or incapacity, which originates in *status* (or forms a constituent element of a *status*), is peculiar to persons of the given class; although it may happen to be denoted by a generic expression which comprises a right or duty in or on persons of other classes. *E.g.* An infant may be bound in a *contract*—but subject to conditions and modifications peculiar to contracts made by infants.

An incapacity (as, to contract, take by purchase, etc.) may be common to many classes, as to aliens, persons convicted and attainted, infants or married women (in certain cases): but, in each case, the incapacity has something peculiar, in extent, ground, etc.

The Terms 'Law of Things' and 'Law of Persons' (with their established Equivalents) are insignificant:

I.e. They give no notion of the purpose of the distinction which they are intended to mark. Law is concerned with rights and obligations (or capacity or incapacity for them): every right resides in a person, and most rights concern *things* (in the Roman sense); every obligation is also imposed upon a person, and generally concerns a thing: therefore *all law is of or concerning persons, and most law, of or concerning things*.⁸

'General and Particular'⁹ would suffice; but the same terms are also used in other senses: namely, to denote law which obtains through the whole of any State, as opposed to that which is peculiar to districts or places.

⁷ See Blackstone, vol. i. p. 121. Natural rights, inborn rights, absolute rights. Blackstone's confusion of meanings of 'natural,' and p. 728, *ante*.

⁸ See 'Method of Blackstone,' next page. ⁹ *Traité*, etc. vol. i. pp. 150, 294.

'Law of Things' and 'Law of Persons' (Blackstone) is further objectionable for my purpose, because these two departments include Delicts, public and private, and Procedure, as modified by *status*: an extension, which (though absurdly) has not been given to them by others.¹⁰ It may also be doubted whether Law of Things was intended to include *Jura ad Rem*.

General or generic Law and Law of Status.

Law of the summum genus 'Persons' (or Law directly interesting, or regarding, all persons): and, Law directly regarding the several genera and species into which Persons are divisible.

NOTES.

The following notes entitled 'Methods,' etc., and frequently referred to in this and the succeeding Lectures, were found among papers some of which contain matter apparently destined to be employed in the completion of the Tables.—S.A.

(1.)

Method observed by Sir William Blackstone (vol. i. p. 122).

1. Law of Persons and Law of Things, so far as regards *primary* rights and obligations.
2. (a) Law of Civil Injuries—(b) of the rights and obligations which thence arise—(c) and of civil procedure:—abandoning, here, the former division into 'Law of Persons and Law of Things;' and mingling civil injuries, etc. as *unmodified* by *status* (or as they concern all classes), with the same, as *modified* by *status*.
3. (a) Law of Crimes, etc.:—abandoning again, etc.

Method as to *Sources*—Equity and many other branches only slightly touched upon (vol. iii. p. 23).

But Crimes, Special Law, and Public Law are not omitted. (See 'Public and Special Law.')

Great superiority of Blackstone's method to that of the Roman Institutional Writers, the French Code, etc.:—

1°. In treating civil injuries—rights, etc. *ex delicto privato*, and civil procedure, each apart from the other, instead of treating any one or two of them implicitly with another (vol. iii. pp. 115, 118).

2°. In treating crimes—rights, etc. *ex delicto publico*—and criminal procedure, in the same manner. 'See Delicts.'

¹⁰ See 'Method of the Roman Lawyers and Blackstone,' pp. 737-741, *post*.

Remarks upon the Method observed by Sir William Blackstone.

Like Gaius and the compilers of the *Institutes*, he has no definite purpose in detaching the Law of Persons from that of Things. Throughout the Law of Things, much that arises out of *status* is considered. *Therefore*, if he intended to make law of persons relate to rights, etc. *ex statu*, he has not adhered to that intention. On the contrary, much that relates to *status*, is, considered under the law of persons; so that if he intended law of persons to contain a mere enumeration of *status*, with the modes in which they begin and end, he has equally deviated from that.

[For a fuller account of the Method observed by Sir Wm. Blackstone, see Table VIII. *post.*]

Rights of Persons as defined by Blackstone (vol. i. p. 122).

Rights of Things : *ibid.*

The distinction supposes that *Things can have rights*.

This is founded upon a misapprehension of the terms of the Roman Law. By *jura personarum* and *jura rerum* the Roman lawyers intended, not the *rights* of Persons and Things, but the law of or relating to persons, and the law of or relating to things. This is manifest from Gaius, the *Institutes*, etc. The former having divided *Jus* or Law into *jus gentium* and *jus civile*, and having shown the various sources of the Roman Law or *Jus*, proceeds to divide that same subject according to the objects or subjects with which it is conversant: 'Omne jus quo utimur vel ad personas pertinet, vel ad res, vel ad actiones. Sed prius videamus de personis.' (Gaii Comm. i. § 8.) And having finished the *jus personarum*, proceeds to treat, not of the rights or even of the 'law' of things, but of their Division and Acquisition.

The misapprehension is founded upon that ambiguity (the application of the same term to law and to one of the consequences or creatures of law) from which, as we have already observed, our own law language is almost alone exempt. (*Jus* ; *Diritto* ; *Droit* ; *Derecho* ; *Recht*.)

But the distinction as explained in the cited places is not only founded upon a misapplication of language, and thereby involves the subject in obscurity:—it is also inconsistent with the subsequent exposition which Sir William Blackstone gives of these same rights. According to the terms of the distinction, the Rights of Persons are such rights as men have to their own persons or bodies: *i.e.* The right of moving without obstruction by others from place to place, subject to limitations imposed by law: and the right of freedom from bodily harm, subject to the same restriction. So that all such rights as a man may have in, over, or to external objects (whether other persons or things), ought, in pursuance of the same distinction, to have been excluded from the rights of persons, and treated of nowhere but under the rights of things.

[Instances from the Commentaries in which Sir William Blackstone has treated rights to things under 'Rights of persons' (in his sense) and conversely. Husband and Wife, Father and Child, etc. vol. i. p. 128. Property, p. 138.]

In consequence of his misapprehension of the term 'Rights of persons,' he has treated (Book I. c. 1) rights to life, reputation, etc. with the obligations to respect them, under the rights of persons; although, as being common to every *status*, it is manifest that they belong to the rights of things. They are in truth universal *jura in re sine titulo*.

The Roman Law is free from this error; its error consisting in *partially* expounding the peculiarities of certain *status* under the '*Jus personarum*,' instead of either giving thereunder a complete exposition of rights *ex statu* (on the one hand), or of limiting that department (on the other) to a mere enumeration of *status* themselves, and of the modes of their investment and divestment. There is, however, no mingling of universal and particular rights, etc. under that department.

*The Distinction between the Jura Personarum and Jura Rerum, as
stated by the Roman Lawyers,*

Is not, like that of Blackstone, liable to the objection that things are supposed capable of rights.

It is however liable to the second objection which we have presumed to advance against the method of the learned Commentator.

Law, as it relates to Persons, ought to have been the only subject of the first grand division. Instead of this, innumerable instances may be cited in which the law as it relates to Things is therein treated of. The Law of Persons is not confined to a mere enumeration of *status*, and a description of the modes in which they begin and end. Instances of rights, obligations, etc. *ex statu*, are scattered up and down the other departments.

(2.)

Methods of the Roman writers.

Whether, according to the Institutional method of the Roman lawyers, *jura ad rem*, or obligations *stricto sensu*, belong to the Law of Things?

The dispute seems to have arisen from confounding *jura in re* with the *jus quod ad res pertinet*.

The first belong partly to the Law of Things and partly to that of Persons; not being (generically considered) either dependent upon or independent of *status*, but being distinguished by this: that they avail against mankind generally.

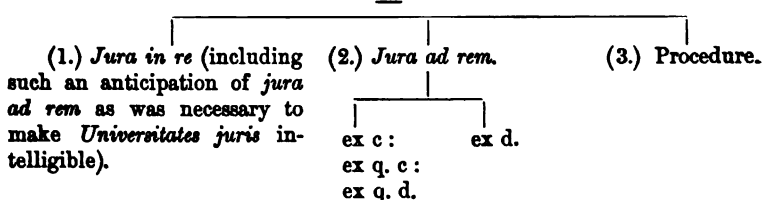
The latter was intended to include, not only all such *jura in re* as are independent of *status*, but also all such *jura ad rem* as are independent of *status*. Actions being intended to comprise Procedure only.

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Proofs:—The announcement of the tripartite division with the corresponding method of treatment: The place occupied by succession *per universitatem* (sed quare). Sir William Blackstone's view of the subject; who places Property, etc. and Contract, etc. under a common department: viz. 'Rights (or, as it ought to be, Law) of Things.'—This also accords with the opinion of Suarez, who divides Law (i.e. primary rights and obligations), in the same manner into two departments, 'Law of Things and Persons.'

The scheme may have been the following:—

- 1st. Rights, etc. *ex statu* (or perhaps a mere enumeration of *status*).
- 2nd. Rights, etc. not *ex statu*.



But, according to the announcement, Procedure and *jus in re* (in one of which *jura ad rem* must be comprised) co-ordinate with *jus personarum*.

Want of a generic expression may have led to all the confusion. Wanting a generic expression to denote the half which it was intended to oppose to *jus personarum*, they have co-ordinated its parts with *jus personarum*, forgetting one of them.

The effect of the whole is this: They intended (though the intention was obscure) to divide the whole of Private Law (excluding therefrom, not only political *status*, but also professional *status* and the whole of criminal law) into two principal departments; one of which they further meant to divide into three divisions. But for want of a generic name wherewith to designate this department, they have treated its divisions as if they were of the same rank as the other department. And further, through forgetfulness (or for some unaccountable reason) they have degraded one of these three divisions to the rank of a subdivision of one of the others, leaving it uncertain to which they intended to refer it.

If this were the scheme, '*Obligatio*' belongs neither to '*Jura Rerum*' nor to '*Actiones*,' but is a division (*on the same line with these*) either (1°) of the great department, 'Law of Rights, etc. *non ex statu*;' or (2°) of the whole of private law (assuming that the proper subject of the Law of Persons is a mere enumeration of *status*, etc.)

(3.)

Remarks upon the method observed by Gaius.

In pursuance of that well-founded distinction between Law of Persons and Law of Things which Gaius, in common with other Institutional writers, has adopted, the main division (according to Ends

and Subjects) *should not have been threefold (still less fourfold), but twofold*; the matter of the Law of Actions (i.e. civil procedure), as unmodified by *status* (or, in other words, the *generalia* of the law of actions), being included under the Law of Things, and the several modifications, under the several *status* out of which they arise.

The treatise is confined to Private Law: i.e. all that relates to political status—to the Sovereign and to the administration of the sovereign power—is excluded. No regular account even is given of the constitution of Courts of Justice, without which the law of actions is not intelligible.

Criminal Law, or *publica judicia* (briefly mentioned in the Institutes): i.e. crimes, punishments, and criminal procedure, are altogether omitted; though the greater part of crimes are as much violations of private primary rights as the private delicts of which he treats. (So also Blondeau, X.)

The purpose of the distinction between Law of Persons and Law of Things, is not only forgotten with reference to civil procedure; but rights and obligations of all other sorts, without distinction to their universality or particularity, are scattered up and down through the two (or three) first divisions. If the purpose was to sever Law of Persons from Law of Things in the manner supposed, all the rights, etc. *ex statu* should have been put into the former, and it should have been placed last.

If the purpose merely was to enumerate the several *status* and to explain the respective modes in which they begin and end, and then to deal with rights and their respective modifications *ex statu* in succession (as explained above), the matter of the treatise should have been divided in a totally different manner; and none of the Rights, etc. which originate in the several *status* should have been thrust into the preliminary enumeration of them.

On that supposition, there would have been no such division as that into Law of Persons and Law of Things. But the space now occupied by what is called the law of persons, would have been merely an introductory disquisition on the several *status*,—the body of the work comprising all rights and obligations; those which originate in *status*, as well as those which do not.

Another great defect is, *the desultory and defective manner of dealing with delicts.* For, first, he confines the term to violations of *jure in re*; only treating *ex professo* of these: as if violations of rights *ex contractu* and of other *jura ad rem* were not just as essential to a complete view of the subject. Secondly, he scatters them through that part of the Law of Things which relates to Obligations, *stricto sensu*, or to *jura ad rem*, and also through the book which is professedly devoted to Procedure;—thus confounding the matter of Actions and Exceptions, etc. with the mode in which these several rights are enforced. Violations of *jura ad rem* are in the same case; and, as is said above, are nowhere expounded explicitly and professedly: being either considered implicitly (under the head '*De Obligationibus*') on occasion of the obligations of which they are violations; or explicitly under '*actions*.'

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Another defect common to Gaius and the Institutes, is the confounding combinations of Alienation and Contract with Contract; and the placing *universitates juris* before *jura ad rem*. See 'Combinations of *jus in re* and *jus ad rem*.'

(4.)

Remarks upon the Method observed in the Institutes.

Having announced a threefold division (and the same objection applies to Gaius)—Persons, Things, and Actions, the compiler makes a fourfold one; treating under 'Things,' of *jura in re*, and under 'Obligations,' of *jura ad rem*: thus opposing one *species* of rights and obligations to another (not by names, one of which denotes one *species* of rights, etc.; and another, another; but) by names the last of which, indeed, has reference to a *species* of rights, but the first of which denotes the subjects of rights. The result of this division is, that instead of treating of 'Things' apart, and then opposing one *species* of rights over things (and other subjects) to another;—he indicates things and a *species* of rights by a name which seems to oppose things to rights; and, what is worse, to oppose them to a *sort* of rights. A consequence of which is, that *jura in re* seem to be suppressed.

Another objection is, that as the obligations which correspond to *jura in re* are not treated of explicitly (but left to be collected from 'delicts'), and, on the other hand, the term 'obligation' is used to denote *jura ad rem*, as well as their corresponding obligations, the first seem to be rights without obligations, and the second obligations without rights. But this arises from that remarkable defect in the Roman law language which I have observed upon above.

The modes in which *jura in re* end, are not described.

(5.)

Method of the French Codes.

The Law distributed under five Codes; viz.:

Matter of the Civil Code.

Matter of the Commercial Code.

Matter of the Code of Civil Procedure.

Matter of the Penal Code.

Matter of the Code of Criminal Procedure.

Defects: Only so much of the Law of Persons as concerns domestic and quasi-domestic *Status* is comprised in the Civil Code. The law which relates to Traders (and which, for reasons given above, ought to enter into the Civil Code under the head of Law of Persons) is made the subject of a distinct Code, and opposed, as it were, to the law of which it is only a member. It is like dividing the human

body into the right or left arm, and all such parts of it as are not right or left arm.

The administration of the law relating to traders by distinct tribunals is itself an absurdity, and not suggested by reason, but the work of blind imitation. And admitting that the separation of jurisdiction is a good, that is no reason for this mutilation. All that is peculiar to traders (tribunal, as well as other peculiarities) would, of course, in a just *Corpus Juris*, be contained under a distinct head; which is all that is done now; the *Code de Commerce* supposing all other parts of the Code.

The rest of the law which relates to *Status* is not in any Code or Codes at all: having never, so far as I know, been reclaimed from chaos: and being only to be found, either in the *Jurisprudence* of the tribunals, or in an immense mass of laws issued from time to time without system.

Civil Injuries are nowhere described; being merely implied in the description of the rights of which they are violations, or in the description of the Procedure by which the Rights and Obligations which they generate are enforced. (Quære.)

Rights and Obligations *ex delicto privato* are, in the same manner, established by implication. (Quære.)

Crimes are nowhere described apart; being implicated with, and described indirectly in the Code of Punishment or that of Criminal Procedure.

(6.)

Bentham's Ideas of Method.

'General Law and Particular Law.'—(*Traité*s, etc. vol. i. p. 150.)

Here, the purpose of the distinction into Law of Things and Law of Persons, is clearly, though briefly indicated, and well expressed: being the purpose of the very distinction between *jura rerum* and *jura personarum* which he reprobates (pp. 259, 294, 299).

Penal—Civil—Constitutional.¹¹ (See various meanings of Civil.)

Confusion of *Status* (i.e. the belonging to a class having peculiar rights, etc.) with the being invested with rights, etc. which arise out of a character that may belong to many classes: as '*Héritier, Vendeur, Voleur, Séducteur*,' etc. pp. 300, 304.

[According to this plan, all that relates to Contract must be repeated under every *status*.

Where a difference in the law is bottomed in some peculiarity in the subject of the right, the difference should be described under the division 'Things.' Quære: Whether any peculiarities of persons (as subjects of rights) should be considered under the several *Status*, or under 'Things' ?]—*Marginal Note*.

¹¹ This refers to the following sentence droit constitutionnel, est la plus commode. — '*De toutes ces divisions, celle en droit pénal droit civil et* vol. i. p. 151.

Idea of treating Obligations expressly and all Rights implicitly.

Confusion of that part of the Code which treats of Civil Injuries, with that which treats of Crimes.

[Wherever a distinct *status* is created (whether it be domestic, special, or public), the peculiarities (whether rights, obligations, incapacities, or exemptions) in which it consists, should not be mixed up with the provisions which are generally applicable. It is merely because it is expedient to treat of these peculiarities apart, that a *status* is created: i.e. that they are professedly treated apart.

Where the mischievous act by reason of which compensation is due from the actor to the sufferer, is not intentional or negligent, can it be called an injury or a violation of a right? Being followed by the same consequence, viz. liability to make compensation (or restitution), it may, by analogy, be called an injury = a quasi-delict, as incidents not contracts are called quasi-contracts.]—*Traité*s, etc. vol. i. p. 334, *Marginal Note*.

Distinction between civil and criminal, pp. 160, 298.

‘Chaque loi civile forme un titre particulier qui doit enfin aboutir à une loi pénale.’

[That is, if the obligation to repair a civil injury be considered as a punishment.]—*Traité*s, vol. i. p. 161, *Marginal Note*.

The next folio is headed,

‘Remarks upon Mr. Bentham’s Ideas of Method;’ but the rest is a blank. The nature of some of the intended ‘Remarks’ may be gathered from the foregoing hints; and from the marginal notes extracted from the ‘*Traité*s.’—S. A.

(7.)

Method of Falck.

In Falck, civil injuries are mixed up, as in the *Institutes*, with contracts and quasi-contracts: and (as also in the *Institutes*) none but violations of *jura in re* are directly described: violations of contract and quasi-contract being either left to be deduced from the description of the contract and quasi-contract itself, or being mixed up with actions: i.e. civil procedure.

The Rights and Obligations arising out of civil injuries are either annexed to the description of the violations, or are confounded with procedure.

Crimes, the obligations arising out of them, and criminal procedure, are blended together; though civil procedure is professedly treated apart from civil injuries and the rights which they beget.

Criminal Law is placed on the same line with, and opposed to, Civil Law; which is absurd for many reasons. First, to oppose (i.e. not merely to distinguish from, but to co-ordinate with) a peculiar species of violations, etc. of primary rights, to those primary rights and to other violations of them, etc. is absurd: Primary Rights and

Obligations being opposed, not to a *species* of violations and sanctions, but to the *whole* of them.

Secondly, Civil Procedure, being by him separated from primary rights and civil injuries, etc. is thus left out of the division into Civil and Criminal. And to make it a co-ordinate class with them seems to be absurd.

See 'Public and Special Law.'

See Falck, *Jurist. Encycl.* Einleitung, § 21.

[The following is the passage referred to in Falck.

'Mit Rücksicht auf die angegebenen Hauptgesichtspunkte werden sich folgende Theile ergeben :

'1. Das Privatrecht mit den Unterabtheilungen in (a) das bürgerliche Recht, (b) das Kirchenrecht, (c) das Polizeirecht, (d) das Criminalrecht, und das Prozessrecht.

'2. Das öffentliche Recht, zu welchem, gehören : (a) das Staatsrecht, (b) das Regierungsrecht, (c) das Finanz- und Cameralrecht, und (d) das Völkerrecht.'

In the margin of the same page are the following remarks :—

Law (or the Science of Law—Jurisprudence) cannot be expounded without dividing it into parts.

The division most in use is founded upon an enumeration of the several sorts of Rights : but, inasmuch as right correlates with obligation, an enumeration of the several sorts of Obligations would be just as good a basis for a division.

Both Right and Obligation (*i.e.* legal right and obligation) being creatures of Law, the notion of Law (or of a politically sanctioned Rule) ought to be placed in front (or to be made the *punctum saliens*) of a division.

The bases are substantially the same. Whether you divide Law as it relates to different subjects, or Rights (with their obligations) as they relate to those same subjects, your divisions will severally be conversant about the same sets of subjects.

A division, of which each part should exclude the subject of every other, is not possible.]

(8.)

Method of Hugo.

1. Opposition of Public and Private Law.

2. Inclusion of International Law in public law, and treating it with *Military Status*.

3. Inconsistency of treating Civil Injuries and Rights *ex delicto privato*, as a portion of private law ; though he puts Civil Procedure, Crimes, etc. under Public.

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4. The making *Polizei-Recht* a distinct department of a system, into all the departments of which its matter enters.

[The portion of Hugo referred to, is the chapter called 'Theile des Rechts,' in the 'Lehrbuch der juristischen Encyclopedie.' The following comments are copied from the margin.]

Rights of Action are classed with Obligations; whilst obligations to suffer punishment (which are not more sanctionative than the former) are referred (together with crimes and criminal procedure) to Public Law. Civil procedure is completely separated from the Rights of Action and the matter for exception, upon which it is built. Civil injuries are not considered directly. Sanctionative Civil Rights, which are exercised extrajudicially, are forgotten. Confusion of Crimes, and their consequent obligations, are classed with Criminal Procedure.

All the other departments into which Law may be distributed, are but collections of fragments detached from the two essential ones; viz. Law of Things or General Law, and Law of Persons or Particular Law.

Law which is conversant with persons as *not* arranged under classes; Law which is conversant with persons as arranged under classes, or, in other words, as invested with *status* or conditions. The former is analagous to the supreme genus: the latter, to the genera and species which are contained in the supreme genus. Only analagous; because the Rights, etc. which are the subject of the former, are not *all* of them *common* to *all* classes. It is, however, analagous, inasmuch as the consideration of it is necessarily implied in the consideration of every *status*.

LECTURE XLIV.

LAW, PUBLIC AND PRIVATE.

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HAVING discussed the distinction between Law of Things and Law of Persons, I proceed to the connected distinction between Public Law and Private Law.

Jus Publicum: Two senses.

The term '*public law*' has two principal significations: one of which significations is large and vague; the other, strict and definite.

Narrower sense.
The law of political conditions.

Taken with its strict and definite signification (to which I will advert in the first instance), the term public law is confined to that portion of law which is concerned with political *conditions*: that is to say, with the powers rights duties capacities and incapacities, which are peculiar to political superiors, supreme and subordinate.

Taken with its strict and definite meaning, public law ought not (I think) to be *opposed* to all the rest of the law, but ought to be inserted in the Law of Persons, as one of the limbs or members of that supplemental department.

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But before I proceed to the *place* which public law (as thus understood) ought to occupy in an arrangement of a *corpus juris*, I will touch briefly on two difficulties, which, it appears to me, are the only difficulties that the subject really presents.

I have said that public law (in its strict and definite signification) is confined to that portion of law which is concerned with political conditions: that is to say, with the powers, rights, duties, capacities and incapacities, which are peculiar to political superiors, supreme and subordinate.

An account of public law in this sense must comprise some of the rules of positive morality.

Now, so far as public law relates to the Sovereign, it is clear that much of it is not law, but is merely positive morality, or ethical maxims. As against the monarch properly so called, or as against the sovereign body in its collective and sovereign capacity, the so-called laws which determine the constitution of the State, or which determine the ends or modes to and in which the sovereign powers shall be exercised, are not properly positive laws, but are laws set by general opinion, or merely ethical maxims which the Sovereign spontaneously observes.

In strictness, therefore, much of the public law which relates to the Sovereign or State, is not matter for any portion of the *corpus juris*: understanding by the *corpus juris* the system or collective whole of the positive laws which obtain in any society, political and independent.

And, for the same reason, it particularly is not matter for the Law of Persons or *Status*. For a *status* or condition, properly so called, consists of *legal* rights and duties, and of capacities and incapacities to take and incur them. And, consequently, a sovereign government of one, or a sovereign government of a number in its collective and sovereign capacity, is not invested with a *status* (in the proper acceptation of the term): or it is not invested with a *status* (in the proper acceptation of the term) derived from the positive law of its own political community.

But though, in logical rigour, much of the so-called law which relates to the Sovereign, ought to be banished from the *corpus juris*, it ought to be inserted in the *corpus juris* for reasons of convenience which are paramount to logical symmetry. For though, in strictness, it belongs to positive morality or to ethics, a knowledge of it is absolutely necessary in order to a knowledge

of the positive law with which the *corpus juris* is properly concerned.

The case which I am now considering is one of the numerous cases wherein law and morality are so intimately and indissolubly allied, that, though they are of distinct natures and ought to be carefully distinguished, it is necessary nevertheless to consider them in conjunction. A description, therefore, of the law which regards the constitution of the State, and which determines the ends or modes to and in which the Sovereign exercises the sovereign powers, is an essential part of a complete *corpus juris*, although, properly speaking, that so-called law is not positive law.

The law of England, for example, cannot be understood, without a knowledge of the constitution of Parliament, and of the various rules by which that sovereign body conducts the business of legislation: although it is manifest that much of the law which determines the constitution of the Parliament, and many of the rules which Parliament follows in legislating, are either mere law imposed by the opinion of the community, or merely ethical maxims which the body spontaneously observes.

So much, therefore, of the law, regarding the Sovereign, as is necessary to a due understanding of the *corpus juris*, ought to be inserted in the *corpus juris*, although it comes not within the predicament of *positive law*. And, since the law regarding the Sovereign ought to be inserted in the Law of Persons, we may say, by way of analogy, that the Sovereign has a *status* or condition; although a *status*, properly so called, is composed of *legal* rights and *legal* duties, or of capacities or incapacities to take or incur legal rights and duties.

And here I will remark, that public law (in its strict and definite meaning) is not unfrequently divided into two portions: *constitutional* law, and *administrative* law: (*Staats-Recht* or *Constitutions-Recht*, and *Regierungs-Recht*). The first comprises the law which determines the *constitution* of the sovereign government: The second comprises the law which relates to the *exercise* of the sovereign powers, either by the Sovereign or by political subordinates.

This division of public law does not tally with the division of it into law which regards the *status* of the Sovereign, and law which regards the rights and duties of political subordinates. The latter, indeed, is probably comprised under administrative law, but the former does not coincide with constitutional law: a considerable portion of it likewise falls under administrative

law. A great portion of our parliamentary law relates to the constitution of the supreme body, but much of it only consists of rules observed by the body itself in conducting the business of legislation and of supreme government, which is properly administrative law.

The second of the two difficulties to which I have adverted, is the difficulty of drawing the line of demarcation, by which the conditions of private persons are severed from the conditions of political subordinates. The powers of master, father or guardian subserve, in many respects, the very purposes for which powers are conferred on judges.

Difficulty
of distin-
guishing
political
from pri-
vate con-
ditions.

This difficulty I have stated in my Outline (p. 71, vol. i. ante) in the following words:—

‘It is somewhat difficult to describe the boundary by which the conditions of political subordinates are severed from the conditions of private persons. The rights and duties of political subordinates, and the rights and duties of private persons, are creatures of a common author: namely, the Sovereign or State. And if we examine the purposes for which their rights and duties are conferred and imposed by the Sovereign, we shall find that the purposes of the rights and duties which the Sovereign confers and imposes on private persons, often coincide with the purposes of those which the Sovereign confers and imposes on subordinate political superiors. Accordingly, the conditions of parent and guardian (with the answering conditions of child and ward) are not unfrequently treated by writers on jurisprudence, as portions of *public* law. For example: The *patria potestas* and the *tutela* of the Roman Law, are treated thus, in his masterly *System des Pandekten-Rechts*, by Thibaut of Heidelberg: who, for penetrating acuteness, rectitude of judgment, depth of learning, and vigour and elegance of exposition, may be placed by the side of Savigny, at the head of all living Civilians.’

The powers residing in a master over his slave, in a father over his child, and in a guardian over his ward, subserve the same general purposes as the powers of judges and other ministers of justice, because they are designed, amongst other purposes, for the prevention of crime. The powers of punishment which the Roman law originally entrusted to the *paterfamilias* were so extensive, that this accounts for the very small space occupied by criminal law in the early Roman law. The place of criminal

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law was mostly supplied by the powers vested in those private persons, who being the proprietary and respectable class, were little tempted to commit crimes, while the remainder of the community were subject to these powers residing in them, and were thereby prevented from committing crimes; or, if they did commit crimes, were punished by those in whose *potestas* they were, at the discretion of those persons.

I cannot see how any precise line of demarcation between political and private conditions can possibly be drawn, unless it be this: that when the condition is private, the powers vested in the person who bears it more peculiarly regard persons determined specifically; when public, those powers more peculiarly regard the public considered indeterminately. For example, the powers of the master over his slaves, of the father over his children, or of the guardian over his ward, regard peculiarly the slaves of that master, the children of that father, or the ward of that guardian, all of whom are persons determined specifically. Whereas the powers vested in a judge, or other officer of justice, are not given with reference to this or that determinate individual or individuals, but generally to the whole community.

This, however, is so extremely vague, that different persons might refer the same condition; some to political, others to private conditions. Accordingly, such is the case. The *patria potestas* and the *tutela* of the Romans are placed by Thibaut and other German writers under the head of public law, while by others, of equal eminence, they are placed in private law. I am not aware, however, that this is of very great importance. Most of the so-called public conditions evidently regard primarily the public indiscriminately; while most of the private conditions, manifestly primarily regard specifically determined persons, and would therefore be put into that class without hesitation.

Public law, or the law of political conditions, should not be opposed to the rest of the legal system, but should form one member or head of the Law of Persons.

Having touched on these difficulties, I now proceed to give my reasons for the proposition which I laid down at the outset of this Lecture, namely, that public law, in its strict and definite meaning, as the law of political conditions, should not be opposed to the rest of the law, but should be inserted in the Law of Persons, as one member or head of that department of the *corpus juris*.

Of the various reasons which might be given for this arrangement, the following reason, I think, will amply suffice.

In explaining the nature of the distinction between Law of Things and Law of Persons I said that there are two reasons for

detaching the rights and duties of certain classes from the body of the legal system: 1st. That it is convenient to place them together under separate heads, instead of leaving them dispersed throughout the whole extent of the *corpus juris*: 2ndly. That they may be detached from the body of the legal system without breaking the coherence of the latter: nay, that the exposition of the latter is more compact and clear, in consequence of those rights and duties being detached from it, and remitted to the supplement or appendix styled the Law of Persons.

Now both these reasons apply in an eminent degree to the powers, rights, and duties of political superiors. With the exception of the powers and duties of judges and other ministers of justice (which perhaps it is expedient to prefix to the general law of procedure), there are no classes of persons whose peculiar rights and duties may be detached more commodiously from the bulk of the legal system than those of public or political persons. And, if the powers, rights, and duties of political persons ought to be detached from the bulk of the legal system, it is clear that they ought not to be opposed to all the rest of the system; but ought to form a limb of the miscellaneous and supplemental department which is marked with the common name of the Law of Persons. For the law which regards specially the powers and duties of political persons, is not of itself a complete whole, but is indissolubly connected, like the law of any other *status*, with that more general matter which is contained in the Law of Things, and also with the law regarding other conditions.

Take, for example, the case of our own King. It is clear that a knowledge of his peculiar powers, rights, and exemptions presupposes a knowledge of the Law of Things, and also of many of the *status* which are styled private. Without a knowledge of the general rules of property, his peculiar proprietary rights, as king, are not intelligible. Without a knowledge of the law of descents, the peculiarities of his title to the crown are not to be understood. Without a knowledge of the law of marriage, his peculiar relations to his royal consort are not explicable.

And the same may be said of the powers and duties of any political person whatever. Considered by themselves, they are merely a fragment. Before they can be fully understood, they must be taken with their various relations to the rest of the legal system.

If, then, the law of political persons be opposed by the name of *public law* to the rest of the legal system, one of these absurdities inevitably ensues. Either a bit of the *corpus juris* is

opposed to the bulk or mass : Or (to avoid that absurdity) the rest of the legal system must be appended to public law ; and public law, *plus* the rest of the legal system, must be opposed to that rest of the legal system from which public law is severed.

There can be no more reason for opposing public law to the rest of the legal system, than for opposing any department of the Law of Persons to the bulk of the *corpus juris*. What should we say to a division of law which opposed the law of bankruptcy, or the law of marriage, to the Law ? And yet the division of law into *jus publicum* and *jus privatum* involves the same absurdity. For *jus publicum* is the law of political conditions, and *jus privatum* is all the law, *minus* the law of political conditions. The opposed terms public and private law tend moreover, in my opinion, to generate a complete misconception of the real ends and purposes of law. Every part of the law is in a certain sense public, and every part of it is in a certain sense private also. There is scarcely a single provision of the law which does not interest the public, and there is not one which does not interest, singly and individually, the persons of whom that public is composed. Some parts indeed of the law, as, for instance, the law of political conditions, primarily regard perhaps more peculiarly the public considered generally ; while other portions regard primarily the single individuals of whom the public is composed. But this line of demarcation is too loose to justify the division ; which seems to import that some portions of the law exclusively regard the public, and others exclusively regard single individuals.

Agreeably to the view which I now have taken of the subject, Sir Matthew Hale, in his Analysis of the Law, and Sir William Blackstone, following Sir M. Hale, have placed the law of political persons (sovereign or subordinate) in the Law of Persons : instead of opposing it, as one great half of the law, to the rest of the legal system.¹² Blackstone divides what he calls law regarding the relative rights of persons into law regarding public relations, and law regarding private relations. Under the first of these he places constitutional law and the powers, rights, and duties of subordinate magistrates, of the clergy, and of persons employed by land or sea in the military defence of the State.

This placing the law of political persons in the Law of Persons as one of its limbs or members, instead of opposing it to the rest of the *corpus juris*, is nearly peculiar to Hale and

¹² See Table VIII. *post*.

Blackstone; and originated with Hale. Among continental jurists, many of whom I have diligently perused, I have not met with a single instance: though Falck of Göttingen says that the Danish Code, and the systematic expositions of the Danish Code, follow this arrangement.¹³ The German jurists treat this arrangement as a great absurdity, importing great *Verwirrung*, or confusion of ideas, though the direct contrary appears to me to be the truth. And the adoption of this arrangement by Sir Matthew Hale, appears to me a striking indication of his originality and depth of thought, since if he had been a mere copyist, he would have adopted the arrangement which was already familiar to him in the writings of the Civilians.

From public law with its strict and definite meaning, I pass to public law with its large and vague signification.

Endeavouring to explain its import, as taken with its large and vague signification, I will advert to the distinction between *jus publicum et privatum* as drawn by the Roman lawyers: that being the model or pattern upon which the modern distinctions into public and private law have all of them been formed.

The Roman lawyers divide the *corpus juris* into two opposed departments:—the one including the law of political conditions, and the law relating to crimes and criminal procedure: the other including the rest of the law. The first they style *jus publicum*, the second they style *jus privatum*.

In a former Lecture¹⁴ I explained the origin of the term 'public wrongs,' as applied to crimes. I observed that they acquired this name from a mere accident, from the fact that crimes were originally tried by a body which might be called without impropriety the public, namely, the sovereign Roman People. The original reason ceased when the jurisdiction in criminal causes was removed from the people, and vested in subordinate judges. But the name remaining, it was supposed afterwards by the Roman jurists, that crimes were called public wrongs, not because of the tribunal by which they were originally tried, but because crimes affected more immediately the interests of the whole community. I exposed this fallacy completely in an earlier part of my Course. I then shewed that what are called civil injuries affect the public interest as much as crimes,

Public law in its large and vague signification originating with the use made of the term by the Roman lawyers. Logical mistake of the distinctions built upon it.

¹³ 'In den Rechtssystemen ausländischer Gelehrten, z. B. der Dänen und Engländer, wird bisweilen die Abhandlung der staatsrechtlichen Verschiedenheit unter den Menschen auch in der

Personenrecht gezogen. Diese Verwirrung der Begriffe kommt bei uns gar nicht vor,'—*Falck*, p. 48, § 27 (note).

¹⁴ See pp. 404, 501, vol. i. *ante*.

and that the distinction rests not upon any difference, in their consequences and effects, but upon the different way in which they are pursued. It is expedient to leave the prosecution of some offences to the discretion of the injured parties: others cannot expediently be so left, and the State is obliged to take the prosecution of them upon itself. The distinction is quite arbitrary; that is a civil injury in one system of law which is a crime in another.

Inasmuch as crimes were, however, supposed to affect more directly the interests of the whole community, and inasmuch as the law of political *status* does really regard it in a more direct manner than any other portion, criminal law and the law of political conditions were placed by the classical jurists together, and were opposed to all the rest of the *corpus juris*.¹⁵

They style criminal law and the law of political conditions *jus publicum*: for, say they, 'ad statum rei Romanæ, ad *publice* utilia spectat.'

They style the opposed department of the *corpus juris* *jus privatum*: for, say they, 'ad *singulorum* utilitatem, ad *privatum* utilia spectat.'

This explains the order of Justinian's Institutes. It is merely a treatise upon private law. By consequence, criminal law, with the law of political *status*, is not comprised by it: The classical jurists, from whose elementary works the Institutes were copied, having thought that public law was not a fit subject for an institutional or elementary treatise. I know not why: for a knowledge of the constitution of the state is as necessary to a knowledge of private law, as the latter is to a knowledge of the constitution of the state. All the parts of the *corpus juris* are in truth so implicated with one another, that they cannot be separated.

Blackstone's Commentaries are not confined to private law, but are intended to serve as an institutional treatise on the whole Law of England: though he touches upon certain parts (as upon equity and ecclesiastical law) in a comparatively brief and superficial manner.¹⁶ The distinction between public and private law is rejected or suppressed altogether, or nearly altogether by him. He does not style the law regarding political conditions a branch of public law, but places it in the law of persons. But, this notwithstanding, there is still a trace of the

¹⁵ Method of Roman Lawyers, p. 371; ¹⁶ Method of Blackstone, p. 735, *ante*.
Bentham's Method, p. 741. See Table See Table VIII.
IX. *post*.

distinction in Blackstone's Commentaries. He styles the department which relates to crimes, and to punishments and criminal procedure, 'Public Wrongs.' This is, I believe, the only vestige of the distinction which Blackstone retains. Hale returns none at all: for, in his analysis, he throws out criminal law altogether. In his Pleas of the Crown, he does not designate crimes by the name of public wrongs, but calls them much more appropriately, pleas of the crown, that is, offences of which the Crown or State retains the prosecution in its own hands.¹⁷

With reference to its ultimate purpose, the law of political *status*, and criminal law, is not to be distinguished from the so-called *private law*. Each tends to the security of the *public*: meaning by the *public*, the several individuals who compose the society, as considered collectively or without discrimination. Each tends to the good of those same individuals considered singly or severally. The only difference is, that in the one case the good of the whole is considered more directly; whilst, in the other, the more immediate object is the good of determinate individuals.

Another reason against the distinction is this. That the matter of the Law of Things is just as much implicated with public law as with the law of private conditions.

The logical error of opposing a small bit of the law to the remainder of the body, is not confined to the distinction between the law of things, and the law of persons, or between public and private law. Many writers, for example, detach *criminal* law from the whole legal system, calling the rest of the law civil. Others detach ecclesiastical law, and oppose all the remainder to it, by the name of *civil*. Others distinguish the law into military and civil. The word civil has about twelve different meanings; it is applied to all manner of objects, which are perfectly disparate. As opposed to *criminal*, it means all law not criminal. As opposed to ecclesiastical, it means all law not ecclesiastical: as opposed to military, it means all law not military, and so on. Even *jus privatum* is sometimes also called *jus civile*.

Nothing can be more varying than the views taken by some modern writers of the distinction between public and private law. Some include in public law, besides the law of political conditions, and of crimes and criminal procedure, the whole law

¹⁷ For an examination of the distinction drawn by the classical jurists, see Table into public and private law, as I., Notes 2 and 8, *post*.

also of civil procedure. As the distinction between public and private law rests upon no intelligible basis, there is certainly no reason why public law should not include this, or any other portion of the *corpus juris*. If these writers had any particular reason for including it, their reason probably was, that public law is administered by public persons, namely by judges, and other ministers of justice, and that the law of civil procedure is administered by the same persons. But a great deal of the law of civil procedure comprises rights vested in private persons: namely, rights vested in the parties to the cause as against the judges, or in one party against the other, in consequence of circumstances arising in the course of the cause. And, moreover, it is manifest that the whole of the law is administered by judges; not the law of procedure only.

From the utter impossibility of finding a stable basis for the division, others exclude criminal law. They see that a multitude of crimes affect individuals as directly as the delicts which are styled civil.

But the greatest logical error of all is that committed by many continental jurists, who include in public law, not only the law of political conditions, of crimes, and of civil and criminal procedure, but also *international law*; which is not positive law at all, but a branch of positive morality. It is sometimes expedient to include in the *corpus juris* a part of what is really positive morality, because positive law is not intelligible without it; but there is no such reason for including international law considered as a complete system of morals, or any part of it, except those parts which have changed their nature, and by adoption have been changed from positive morality to a part of the positive law obtaining in the particular country. If not parts only, but the whole of international law is to be included in the *corpus juris*, there is the same reason for including it in the whole of the positive morality of the particular country; for on this, as well as on international morality, positive law is in a great measure founded.

Every division of law into which this detestable word enters must be indefinite. To shew the thickness of the confusion which surrounds it, we may refer to the impotent attempt of Burke in a passage of his 'Thoughts on Scarcity' to define public law.

The phrase *public law* has at least four or five totally different meanings. 1st; it has either of the two meanings above adverted to: its strict or definite and its large or vague

sense. 2ndly; it sometimes means the law which proceeds either from the supreme legislature, or from subordinate political superiors, as distinguished from what have been termed laws *autonomic*, that is, laws set by private persons in pursuance of legal rights with which they are invested. These laws which proceed indirectly from the sovereign legislature, through rights with which it has invested private persons, are called private laws, and all other public laws. 3rdly; public laws are sometimes opposed to laws creating *privilegia*. Laws of this kind are sometimes called *jus singulare*, and *jus publicum*, as opposed to them, is called *jus commune*. I may here observe, that if the *privilegium* confer a *right*, or if that right be of the class of *dominia*, or *jura in rem*, that is, rights availing against the world at large, the law creating the *privilegium* is so far as much *publicum* or *commune* as any other law, since it imposes a duty upon all persons indiscriminately. 4thly; under public law are sometimes classed definite and obligatory modes of performing certain transactions. 'Testamenti factio non privati sed publici juris est.' 5thly: by public laws are sometimes meant the laws called *prohibitive* or *absolutely* binding, as opposed to the laws called *dispositive* or *provisional*. The legislator in certain instances determines absolutely what shall be the effect of a given transaction, namely, determining what effect the transaction shall have, if the parties do not provide otherwise. Now, when the legislature determines absolutely the effect of a transaction, the law is called *public*: when he leaves a certain latitude to the parties, it is called *dispositive* or *provisional*; being to take effect only in case no disposition is made by the parties themselves. In France, this is the case with the law of marriage. The Code lays down two or three different sets of rights and duties, which may be the consequences of marriage at the option of the parties; only determining what legal effect the marriage shall have if the parties do not contravene the disposition of the law. This use of terms accounts for the meaning of several principles of law which appear to have a great sense in them, but which are merely identical propositions. *Jus publicum privatorum pactis mutari non potest*: but *jus publicum* is the law which cannot be so changed; the proposition, therefore, only means that law which cannot be modified by private connections, cannot be modified by private conventions. In like manner pacts are divided into *pacta quæ ad jus spectant*, and *pacta quæ ad voluntatem spectant*. Another of these saws, which is equally insignificant, is this: *privata conventio juri publico nihil derogat*.

This use of the term *jus publicum* is eminently absurd. The law so-called is no more public law than any other. It is expedient in the one case, for the sake of the public, that the effect of a transaction should be definitively settled by the legislature; in the other case it is expedient that the effect should not be thus peremptorily predetermined, but that a certain degree of latitude should be allowed to the parties.

An anomaly in the arrangements of the continental jurists noticed.

A similar logical error to those which I have pointed out, is the separation from the rest of the law by the jurists of France and Germany, of *special* law, or the law of the conditions which I call *professional*; conditions not domestic, or, in the words of Hale, *economical*, but arising by reason of carrying on certain trades or professions. By the laws, and the expository writers of the Continent, the law of professional conditions is not placed in the law of persons as a limb or member of it, but is severed from the whole *corpus juris*, and opposed thereto. The most remarkable instance of this is in the French Code. Only so much of the Law of Persons as concerns the domestic and quasi-domestic conditions, is placed in the civil code; the law of traders is the subject of a separate code, termed the *Code de Commerce*, which stands opposed to the body of the law. There is also a *Code rural*, relating to the conditions which have reference to agriculture. The other professional conditions are not mentioned in any code at all, but seem to be left to the old chaos of *jurisprudence*.

This is a remarkable instance of the servility with which the French code was compiled. The traders and others are subject to peculiar laws, and a peculiar procedure, arose from mere accident. A king of France, I think Francis I., was bribed by the merchants of Marseilles, to give to merchants the privilege of being ruled by a better law, and a better and cheaper procedure. This accordingly was blindly adopted by the authors of the French code; never considering whether, if the procedure of their peculiar tribunals be really better than that generally prevailing in France, it ought not to be introduced into the ordinary courts.

No intelligible basis for the distinction between public and private law as co-ordinate de-

Public and special law, or law of political and professional *status*, are departments of the Law of Persons. Public Law, in this (or any other sense) is not distinguishable from any other portion of internal law by its final cause: viz. the good of the Public. Public Law in this sense, is adjective, instrumental or sanctioning: but so is the law of crimes and civil injuries, of

rights *ex delicto*, and of procedure: nay, so are many portions of primary, or civil, rights, etc. If, therefore, the distinction into private and public law is to be observed, *these* must enter into public law.—If crimes and criminal procedure are to be included in public law by reason of their sanctioning character, so must civil injuries, etc. (See Notes, p. 735 *et seq.*)

LECT.
XLIV
partments,
whether
public law
be taken in
its large or
in its nar-
rower
sense.

Public Law and Private Law cannot (in these senses) be opposed to one another, or treated as co-ordinate departments of a common whole. The Law of Things (and even the law of descents and professional *status*) contained matter which political *status* suppose; and which are also supposed by public law in any other sense.¹⁸ The term 'public law' is mis-expressive; as denoting, not merely the law of political *status*, but either *all* law, or all law which regards violations and sanctioning rights, etc.

The distinction between private law and public law (considered as co-ordinate departments) rests upon no intelligible basis, and is inconvenient. If it be said that the end of public law is the protection and enforcement of primary rights and obligations in and on individuals, the answer is, that that is also the end or final cause of the law of civil injuries, etc., and of the law of crimes, etc. A property or quality which belongs to several objects can be no ground for distinguishing some of them from the rest.

By 'the Public' (where it means anything) we mean all the individuals who compose the community, governors as well as governed. In which sense of the word public, *all Law is public*; whether we look to the *persons* in whom rights and obligations reside, or whether we look to what is, or at least ought to be, the *end* of law:—that end being the good of all. If it be said, that by 'the public' is meant the governors, and by private persons, the governed; by Public Law, the law which relates to the powers, rights, and obligations of the governors as such; and by Private Law, the rights, etc. of the governed as such; the answer is that the *terms* are equivocal: 'public,' denoting something besides 'relating to governors.' Taken with its large signification, the distinction (if there is one) which the term 'public law' gives rise to must be this:—

Public Law is that portion of the law of any country which determines the powers, rights, and obligations of certain *status*: viz. those of governors as such; and, by implication, those of the governed as such.

Private Law:—that which determines all the rights, etc. of

¹⁸ Blackstone: Instances in Parliament, King, etc. vol. i. p. 193.

all the other classes, exclusive of their rights, etc. in regard to the governors.

There is no reason for opposing the rights, etc. which grow out of *political status* to all others; more than for opposing the rights, etc. which grow out of *any other status* to the rest of the law.

If it be said that these rights, etc. *are purely instrumental*; the answer is, so is Criminal Law. And if it be said that *that* is also public, so is the law of civil injuries; nay, so are many of the primary rights which are confessedly private or civil; as *e.g.* those of trustees—those of parents, to a considerable extent.

It is not contended that they ought not to be *separated*; but it is contended that they ought not to be *opposed* to all the rest.

All relations of subject to subject imply another relation to the Sovereign as wielding the sanction; And in this sense absolute obligations are relative: *i.e.* relative to the power or right of punishing, in case of violation.

The great reason against the division is this:—That many or most of the generalia which are contained in the Law of Things are just as applicable to the *status* of governors as to any of those of the governed: *e.g.* the governor is proprietor; makes contracts, etc. These generalia, therefore, applying to all *status*, you cannot logically separate one of these *status* from the rest, and oppose it not only to the rest, but also to that generical matter which is common to it with the rest. Suppose I opposed animals and horses to men, by reason of an imaginary superiority in men to other animals.

The judicial, military, and other political *status* stand in the same relation to primary rights, as sanctioning rights and obligations; *i.e.* they minister to the protection of those primary rights. This is a reason for rejecting the division into *jus privatum* et *jus publicum*. For either delicts, rights *ex delicto*, and procedure, must be arranged with *jus privatum*, contrary to the division; or the division must be preserved, and the connection between primary rights, etc. and sanctions lost sight of, in consequence of the burying these last in the rights, etc. of governors. Again; the primary rights of governors stand, with the sanctioned rights of the governed, in a common relation to sanctioning rights and obligations. The Sovereign is not only the author of Law, but is also protected in his primary rights by the sanction which emanates from himself.¹⁹

¹⁹ See 'Outline,' p. 43, vol. i. *ante*.

Again; many of the definitions and explanations contained in *jus privatum* are equally applicable to *jus publicum*. Where then, with this division, are they to be placed? Are they to be placed under *jus publicum*? or repeated in both? or separated from both, and treated under a common head? [*E.g.* All those parts of procedure which are not specially applicable on behalf of, or against political persons, ought to be placed under *jus privatum* (Law of Things and Law of Persons), and yet that part of them which belongs to Law of Things, is as much a *præcognoscendum* to political as to private *status*.]

Jus publicum, so far as it has a meaning, denotes all those rights and obligations (including institutions) which minister to the protection of other rights. In this sense, the law of civil injuries, crimes, etc. is a part of *jus publicum*. To sever therefore *jus publicum* from *jus privatum* would lead to a most inconvenient arrangement; destructive of the division into Law of Things and Law of Persons.

The fundamental distinction of Law of Things and Law of Persons, is built upon the conveniency of considering the genus apart from, and before, the several species contained under it. By consequence, *so much of jus publicum* (whether it consists of constitutional, judicial, or any other branch of administration) as is necessary to the apprehension of the genus 'Law of Things,' should be put into the Law of Things; the rest dismissed to the Law of Persons. The objection urged by Falck to Blackstone in this respect appears to me to be unfounded.

International law, so far as adopted, etc. is, in a great measure, *private law* (*i.e.* it regards the relative rights and obligations of *private* persons, members of separate states); and belongs to Law of Persons: Aliens, seamen, etc.

If private law ought to be opposed to public, it ought to precede; since that part of it which is called the Law of Things contains numberless *præcognoscenda* which are equally applicable under public law, and which, therefore, must otherwise be repeated.

To oppose public law to private, is to oppose the law which regards certain classes of persons to all the rest of the law: *i.e.* not only to the law which regards the rights, etc. that are particular to all other classes, but to the rights, etc. which regard *all* (public persons included). Much of what must be looked at in considering public law is, in every system, included under private law; so that here is a division, of which one of the members contains much that belongs to the other. Ecclesiastical and *Civil*, Military and *Civil*, etc. are in the same case.

NOTES.

The only wrongs which, with propriety, can be called 'public' are violations of such rights (if any such there be) as are vested in the public (not in the government *for* the public): Meaning by the Public, in the first instance, a corporate or juridical person; and by the Public (in the second instance) that aggregate of individual and juridical persons who can only be considered as a whole, by reason of their living under the protection of the same government. In some of the United States, Indictments, etc. are drawn in the name of the People, Commonwealth, etc.; but this is a mere flourish.

Any injury cognisable by the law of England will be found to be an injury to some person or body of persons. Public nuisances for instance; offences against *bonos mores*, etc., which seem to be violations of obligations to which there are no corresponding rights in any given person or persons; and which may be called public offences, by reason of the injury being entirely contingent, and being liable to fall upon *any* of the whole heterogeneous mass which is called the Public. In all other cases of intentional or negligent violation, there is the same contingent evil, but there is also a past injury done to some assignable individual, either in his own right or as trustee for others.—*Marginal Note in Blackstone*, vol. iii. chap. 13.

Jus publicum.

- 1°. Jus quod ad statum rei publicæ spectat.
 2°. Jus legislatore [publicæ] } constitutum [idque directe vel indirecte]. } oppositum { Normis privatorum voluntate, legibus consentientibus, constitutis.
 3°. Jus commune, oppositum singulari.
 4°. Jus prohibitivum sive } absolute obligans. } oppositum { dispositivo sive provisionali.
 MS. *Table in margin of Mühlenthal*, vol. i. p. 70.

LECTURE XLV.

LAW OF THINGS.—ITS MAIN DIVISIONS.

LECT.
XLV
Division
of the Law
of Things
(or the Law
minus the
Law of
Persons)
into pri-
mary and
sanction-

I HAVE endeavoured to suggest the purport and uses of the division into Law of Things and Law of Persons: into General Law and Special Law: into a General Code and Particular Codes: or into *the* Law considered generally, and those portions of the law which peculiarly regard peculiar classes of persons, and which it is commodious to detach from the bulk of the system, and to consider (in appropriate chapters) under a distinct department.

I have also endeavoured to explain the various meanings

which are annexed to the expression *jus publicum* :—to explain the two disparate distinctions between *jus publicum* and *jus privatum* ;—to shew that the distinctions are needless and perplexing ;—and that public law, taken with a definite meaning (or as meaning the law of political conditions), ought not to be opposed to the rest of the law, but ought to be inserted in the Law of Persons, as one of its limbs or members.

LECT.
XLV
ing rights,
etc.

I will now endeavour to explain the main division, which, in my opinion, should be given to the Law of Things.

The leading division which I would give to the Law of Things, I will first read from my Outline, and will then endeavour to illustrate by additional remarks.

1. There are facts or events from which rights and duties arise, which are legal causes or antecedents of rights and duties, or of which rights and duties are legal effects or consequences. There are also facts or events which extinguish rights and duties, or in which rights and duties terminate or cease. The events which are causes of rights and duties may be divided in the following manner: namely, into acts, forbearances, and omissions, which are violations of rights or duties, and events which are not violations of rights or duties.

Acts, forbearances, and omissions, which are violations of rights or duties, are styled delicts, injuries, or offences.

Rights and duties which are consequences of delicts, are sanctioning (or preventive) and remedial (or reparative). In other words the ends or purposes for which they are conferred and imposed, are two: first to prevent violations of rights and duties which are not consequences of delicts; secondly to cure the evils or repair the mischiefs which such violations engender.

Rights and duties not arising from delicts, may be distinguished from rights and duties which are consequences of delicts, by the name of 'primary' (or principal). Rights and duties arising from delicts, may be distinguished from rights and duties which are not consequences of delicts by the name of 'sanctioning' (or 'secondary').

My main division of the matter of the Law of Things, rests upon the basis or principle at which I have now pointed: namely, the distinction of rights and duties (relative and absolute) into primary and sanctioning. Accordingly, I distribute the matter of the Law of Things, under two capital departments—1. Primary rights, with primary relative duties. 2. Sanctioning rights with sanctioning duties (relative and absolute): Delicts or injuries (which are causes or antecedents of sanctioning rights and duties) included.²⁰

If I adopted the language of Bentham, and of certain German writers, I should style the law of primary rights and duties,

²⁰ Outline, pp. 43, 44, vol. i. ante.

substantive law ; and the law of sanctioning or secondary rights and duties, *adjective* or *instrumental* law. In other words, I should divide the Law of Things, or the bulk of the legal system, into law conversant about rights and duties which are *not* means or instruments for rendering others available ; and law conversant about rights and duties which are merely means or instruments for rendering others available. Substantive law as thus understood is conversant about the rights and duties which I style primary : Adjective law, about the rights and duties which I style secondary.

But it will appear, on a moment's reflection, that the terms substantive and adjective law tend to suggest a complete misconception of the nature of the basis on which the division rests.

All the rights and duties which I style sanctioning or secondary, are undoubtedly means or instruments for making the primary available. They arise out of violations of primary rights, and are mainly intended to prevent such violations : though in the case of the rights and duties which arise out of civil injuries, the secondary rights and duties also answer the subordinate purpose of giving redress to the injured parties.

But though secondary rights and duties are merely adjective or instrumental, many of the rights and duties which I style primary are also of the same character. *E.g.* : The rights and duties of Guardians are merely subservient to those of the ward : The guardian is clothed with rights and duties in order that the rights of the ward may be more effectually protected, and in order that the duties incumbent on the ward may be more effectually fulfilled.

The same may be said of many of the rights and duties of Parents : of most of the rights and duties of subordinate political superiors, and, generally, of all rights which are merely fiduciary, or are coupled with trusts. These rights and duties suppose the existence of others, for the protection and enforcement of which they are conferred by the State.

In short, rights and duties are of two classes :

1st. Those which exist *in* and *per se* : which are, as it were, the ends for which law exists : or which subserve immediately the ends or purposes of law. 2ndly. Those which imply the existence of other rights and duties, and which are merely conferred for the better protection and enforcement of those other rights and duties whose existence they so suppose.

Though secondary rights and duties (or rights and duties

arising out of injuries) are of this instrumental character, many rights and duties which are primary or principal (or which do not arise out of injuries) are also of the same nature. The division therefore of Law into law regarding primary rights and duties, and law regarding secondary rights and duties, cannot be referred to a difference between the purposes for which those rights and duties are respectively given by the State. And I object to the names, 'Substantive and Adjective Law,' as tending to suggest that such is the basis of the division. It appears to me that the division rests exclusively upon a difference between the events from which the rights and duties respectively arise.

Those which I call primary do not arise from injuries, or from violations of other rights and duties. Those which I call secondary or sanctioning (I style them sanctioning because their proper purpose is to prevent delicts or offences) arise from violations of other rights and duties, or from injuries, delicts, or offences.

The rights and duties which I style secondary, suppose that the obedience to the law is not perfect, and arise entirely from that imperfect obedience. If the obedience to the law were absolutely perfect, primary rights and duties are the only ones which would exist; or, at least are the only ones which would ever be exercised, or which could ever assume a practical form. If the obedience to the law were absolutely perfect, it is manifest that sanctions would be dormant: and that none of the rights and duties which sanction others, or which are mainly intended to protect others from violation, could ever exist in fact or practice, although they would be ready to start into existence on the commission of injuries or wrongs. If the disposition to obey the law were perfect, and if the law were perfectly known by all, there would be no injuries or violations of the law: and, by consequence, all the law relating to injuries, to the rights, duties, and other consequences flowing from injuries, and to procedure, would lie dormant.

We undoubtedly can conceive a state of society so improved and refined that the obedience to the law would be perfect. And this notion is what possibly led to the speculations of Godwin, Fichte, and others, about the possibility of doing without a government. Fichte said that it was the proper duty of every Government, *sich selbst entbehrlich zu machen*, to enable itself to be dispensed with. But though we may conceive a state of society thus highly cultivated and improved, we cannot

look forward to its being realised, though undoubtedly a Government is good or bad in the ratio in which it approaches or recedes from that ideal. The speculations of these writers on the subject are not only useless, but there is a confusion of ideas in their own supposition. It is possible to conceive society without a government proper, and without law properly so called; without a commanding head and without law which properly commands; having merely a guiding and directing head which issues not properly imperative laws, but merely recommendations; or, as they have been called by Civilians, laws of imperfect obligation. But it is impossible (except in the first made state) to conceive society without one guiding or directing body; for positive morality, or the principal of its parts, namely the law set by general opinion, is necessarily so uncertain that it cannot serve as a complete guide of conduct, nor can it be sufficiently minute and detailed. The speculations, therefore, of Fichte and Godwin, not only sin in this respect, that by their exaggeration they render practicable improvement ridiculous, but in that they are founded on a complete confusion of ideas.

I do not deny that rights of the sort which I have called primary, may arise from injuries in a remote and consequential manner; as, for example, the rights arising from a judgment, or the lien of the plaintiff on the lands and goods of the defendant. But these rights do not arise so much from the injury itself, as from a peculiar title or mode of acquisition, namely the judgment and the institution of the suit. In order, however, to meet this objection, I will define primary rights and duties to be those which do not arise from violations of other rights or duties directly.

My main division of the Law of Things is, therefore, this :
1st. Law regarding rights and duties which do not arise from injuries or wrongs, or do not arise from injuries or wrongs directly or immediately. 2ndly. Law regarding rights and duties which arise directly and exclusively from injuries or wrongs. Or, law enforced directly by the Tribunals or Courts of Justice : and law which they only enforce indirectly or by consequence. For it is only by enforcing rights and duties which grow out of injuries, that they enforce those rights and duties which arise from events or titles of other and different natures.

Under the department of the law which relates to secondary rights and duties I include Procedure, civil and criminal. For

it is manifest that much of procedure consists of rights and duties, and that all of it relates to the manner in which secondary rights and duties are exercised or enforced.

And here Bentham's arrangement seems to me to be defective, as is also that of several German writers who have adopted the same views. In the *Traité de Législation* Bentham severs from *droit substantif* or the law, *droit adjectif* or the law of procedure. This, as it appears to me, involves a double logical error. For in *droit substantif* he includes *droit civil* (as opposed to *droit pénal*) and *droit pénal*; including under *droit pénal*, the law relating to civil injuries and to crimes with their punishments, together with the rights and duties growing out of those delicts and of those punishments. But first, as I have already remarked of substantive law as thus understood, much is adjective or instrumental. For all rights of action arising out of civil injuries are purely instrumental or adjective; as well as the whole of criminal law and the whole law relating to punishments. And 2ndly, if he calls the law of procedure *droit adjectif*, he ought to extend that term to the law relating to the rights and duties arising from civil injuries and from crimes and punishments. The division itself, therefore, is illogical, and his limitation of adjective law to the law of procedure only, involves a second logical error.

Distinction between an action considered as a right, and an action considered as an instrument by which the right of action is itself enforced.

It is said by Heineccius, 'actio non est *jus*, sed *medium jus persequendi*.' But it is impossible to distinguish completely a *right of action* from the action or procedure which enforces it. For much of the right of action consists of rights to take those very steps by which the end of the action is accomplished. It is perfectly true, that the scope or purpose of the right of action is distinct from the procedure resorted to when the right is enforced. Much of the procedure consists of rights which avail against the ministers of justice rather than against the defendant. And the parts of it which consist of rights against the defendant himself, are totally distinct from the end which it is the object of the process to accomplish.

But still it is impossible to extricate the right of action itself from those subsidiary rights by which it is enforced. And it is manifestly absurd to deny that the process involves *rights*, because

the rights which it involves are instruments for the attainment of another right. And this is a reason for joining the law of procedure to the law of civil injuries and crimes.

While I am upon this subject, I will observe that a position of mine in a former part of my course, that every right of action arises from an injury, or violation of some other rights, has been objected to.

But it seems to me that the only cases in which a right of action *does not* presuppose an injury, arise from that anomaly in the English Law which I endeavoured to explain in a preceding Lecture; *i.e.* cases in which a right of action is given, although there has been no wrong on account of the want of wrongful consciousness on the part of the defendant.

Instance:—Possession *bond fide*: as in cases of money paid and received under a mistake: or of possession by purchase from a stranger who had no title: So long as the unconsciousness lasts, the possessor is not guilty of a wrong, but lies under a quasi-contract to restore. So soon as consciousness arises, he is guilty of a wrong.

In the case of an amicable pursuit, it may appear that there is a right of action without a wrong. But, in these cases, the question always is, whether there be in truth a wrong or not? A question arising from the uncertainty of the law, or from some uncertainty as to the fact.

What I affirm is, that every right of action arises from a wrong. I do not affirm that an action may not be wrongfully brought, or may not be brought in a case where there has been no wrong. So long as law and fact shall continue uncertain, questions will frequently arise as to whether a wrong has been really committed or not. To determine this very question is manifestly the purpose of the process which is styled pleading: *i.e.* of every step in the process which succeeds the plaintiff's demand.

No Court of Justice (*acting as such*) would decide on a question of law or fact without a suggestion, on the part of the plaintiff, of a wrong, actual or impending. The Courts would not decide a purely speculative case, or advise the parties as to their future transactions; or if they did, they would not be acting as courts of justice. In exercising voluntary jurisdiction, they are rather lending solemnities to certain contracts. They are rather acting as registration offices than as courts of justice. What is called voluntary, and what is called contentious jurisdiction, are only linked up together under one name, because

the judges, who, as such, have to do with the latter alone, sometimes combine with it the former, as they do various other functions.

In most systems of law, a vast number of primary rights and duties are not separated from the secondary: That is to say; The primary right and duty is not described in a distinct and substantive manner; but it is created or imposed by a declaration on the part of the legislature, that such or such an act, or such and such a forbearance or omission, shall amount to an injury: And that the party sustaining the injury shall have such or such a remedy against the party injuring; or that the party injuring shall be punished in a certain manner.

Nay, in some cases, the law which confers or imposes the primary right or duty, and which defines the nature of the injury, is contained by implication in the law which gives the remedy, or which determines the punishment.²¹

And it is perfectly clear that the law which gives the remedy, or which determines the punishment, is the only one that is absolutely necessary. For the remedy or punishment implies a foregone injury, and a foregone injury implies that a primary right or duty has been violated. And, further, the primary right or duty owes its existence as such to the injunction or prohibition of certain acts, and to the remedy or punishment to be applied in the event of disobedience.

The essential part of every imperative law is the imperative part of it: *i.e.* the injunction or prohibition of some given act, and the menace of an evil in case of non-compliance.

The reason for describing the primary right and duty apart; for describing the injury apart; and for describing the remedy or punishment apart, is the clearness and compactness which results from the separation. The cause of the greater compactness is that the same remedial process is often applicable, not merely to this particular right, but to a great variety of classes of rights; and, therefore, if it be separated from the rights to which it is applicable, it may be disposed of at once; otherwise

²¹ 'But though a simply imperative law, and the punitive law attached to it, are so far distinct laws, that the former contains nothing of the latter, and the latter, in its direct tenor, contains nothing of the former; yet by implication (and that a necessary one) the punitive does involve and include the import of the simply imperative law to which it is appended.'—Bentham, Principles, etc. p. 329.
Not so. The two branches (imperative and punitive) of the law, correlate. If the imperative branch of the law did not import the sanctioning, it would not be imperative, and *e converso*.—Marginal note.

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it must be frequently repeated. But it is perfectly clear that the description of any of the separate elements, is not complete without reference to the rest. I *have* no right, independently of the injunction or prohibition which declares that some given act, forbearance or omission, would be a violation of my right; nor would the act or forbearance be a violation of my right, unless my right and the corresponding duty were clothed with a sanction, criminal or civil.

In strictness, my own terms, 'primary and secondary rights and duties,' do not represent a logical distinction. For a primary right or duty is not of itself a right or duty, without the secondary right or duty by which it is sustained; and *e converso*.

So complete is the complication of the one branch of the law with the other, that some primary duties cannot be described with any approach to completeness in their own part of the law; they can only be apprehended by looking at the description of the corresponding injury. Of this the two great classes of *jura in rem*, *dominium* and *servitus*, are instances. *Sic utere tuo ut alienum non lædas*: how can this duty be understood without first knowing the meaning of *tuum* and injury? There is often to be found no definition of a particular right, only an approximation to a definition, in so far as the acts and forbearances which are violations of it are declared to be crimes or injuries, and described in that portion of the law which relates to crimes and injuries. In Blackstone, the right of property is nowhere defined; and in the Roman lawyers, only in the most general way, with no attempt to enumerate the particular rights composing it and duties annexed to it.

Examples of the involution of primary rights and duties, in the description of the injuries, or of the remedies or punishments.

The rights which Blackstone styles *absolute*, are by him described apart from the corresponding injuries, and from the corresponding remedies or punishments. Not so in the Institutes: There they are described implicitly, together with the corresponding injuries, in the department which relates to obligations arising from delicts. Owing to this, and to his not understanding the expression, 'Law of Persons or Conditions,' he has placed them with the Rights of Persons. He fancied that the Roman Lawyers had forgotten them, and that otherwise they would have placed them there; whereas they did not overlook them, but placed them where they should be, in the Law of Things.

Again, the duties which I have called absolute, as, for instance, the duties owed immediately to the State, are scarcely ever described explicitly, but involved in the description of the acts or omissions which are violations of them, or of the procedure by which these violations are to be pursued.

Another instance is the Prætorian Edict. As I stated in a former Lecture,²² the Prætor by his Edict did not formally declare that he conferred such or such rights, or imposed such or such duties. He declared that in certain cases he would give certain actions, or would give certain defences: the description of the action involving a description of the injury, and supposing a right conferred.

To shew how little logic is to be found in the very best attempts yet made to distribute the *corpus juris* into parts, I will observe that the description of the injury and of the remedy is sometimes annexed immediately to the primary right or duty; in other cases, removed to a totally distinct department. An example of this is the order of the Institutes in respect to rights and duties which arise from the infringement of rights *ex contractu*, and *quasi ex contractu*. By *obligationes ex delicto*, they meant what we mean by the same phrase in English law, namely, duties arising from violations of rights which avail against the world at large. Now the authors of the Institutes oppose to these, *obligationes ex contractu* and *quasi ex contractu*: but rights and duties arising from contracts and quasi-contracts are rights and duties existing for their own sake, as the Germans express it: they belong to the class of primary or principal rights and duties. Consequently there is no place for the obligations arising from the breach of obligations *ex contractu* and *quasi ex contractu*; these are consequently attached to the description of those obligations themselves. By this rule, however, *obligationes ex delicto* (by which the authors of the Institutes meant obligations which arise from violations of *jura in rem*) ought, in consistency, to be attached to that part of the law which is concerned with *dominia* or *jura in rem*; or, if banished to a separate head, obligations arising by offences against the rights founded on contracts and quasi-contracts ought to be placed there along with them. Such, for instance, are rights of action arising from a contract; for it is evident that there can be no action upon a contract until it is broken.

Blackstone's method, though in general greatly inferior to that of the Roman Lawyers, is here superior to it. Under the

²² See p. 600 ante.

head of personal property he treats of those obligations arising from contracts and quasi-contracts which are *primary*: in his third volume, when treating of wrongs, he adverts to those obligations growing out of contracts or quasi-contracts which arise from breaches of those primary ones.

[The following Notes were found at the end of the foregoing Lecture. They are written on loose sheets of paper, without any mark as to the order in which they were to follow.—S. A.]

Several Divisions of Law.

Primary (or sanctioned) Rights and Obligations distinguished from sanctioning :

Law has sometimes been divided into substantive law and adjective or instrumental law, *i.e.* Law which relates to Rights and Obligations ; and Law which relates to the means of enforcing these rights and obligations.

Objection : Many of the rights and obligations which are included under substantive law are adjective or instrumental ; as, *e.g.* the powers and rights of Governors ; those of Trustees.

The rights and obligations, therefore, which are the matter of substantive law, cannot be distinguished universally from the matter of adjective law, by their immediate end or purpose. Though most of them are rights and obligations for the enforcement of which the others exist, some of them are altogether instrumental. Though many of the rights of Governors are substantive, yet the rights which they possess in this capacity belong to them as private persons. The powers and rights which belong to them as Governors, *ought* at least to belong to them, not for their peculiar advantage, but for that of all.

As these rights, independently of violation, cannot be classed with those which suppose violation, it is manifest that we must find some other basis for the distinction between primary and sanctioning than this : *viz.* that the first are the rights and obligations to be secured, the others are merely securing. The distinction seems to be founded upon the difference of the incidents in which they directly begin. The first do not begin in violation, the second do. I say *directly* : because (as in judgments) the second may *end* in a fact which generates one of the first.

With reference to the final cause or ultimate purpose of law (be it exactly what it ought to be or not), rights and obligations are divisible into two sorts : Those which minister directly to that end, and those which are intended to prevent or remedy violations of the former.

Or the distinction may be expressed thus ;—the first are *not* immediately enforced by the judicial power ; the second are those which are *immediately* enforced.

The distinction seems to be into Rights and Obligations which do *not* arise out of violations, and those which *do*. Amongst the former (as, e.g. the powers of Courts of Justice), many are sanctioning. So that the division into sanctioned and sanctioning is not complete; many of those which are *sanctioned* being also *sanctioning*.

The division, therefore (a division which applies to law of things and to law of persons equally), is this: 1. Rights and Obligations which do not arise out of infractions. 2. Violations. 3. Rights, etc. which do: i.e. Primary (or original or civil) rights, etc. and rights, etc. *ex delicto*.

Rights and obligations which it is the *end of the Law* to secure and to enforce.—Rights and Obligations which are created for the purpose of securing and enforcing the others.

This, from its simplicity, is specious, but will not suffice.

Distinction between Rights, etc. *ex delicto*, and the *Procedure* (also consisting in the exercise of rights) by which they are enforced.

Distinction between Civil and Criminal. The latter might (and in fact to a great extent does) contain the former: i.e. In the Code of Remedies, the rights intended to be protected, with the violations of them, might be (and in fact to a great extent are) implicitly contained.

This is the case with most rights established by judicial decision; decisions being *directly* decisions upon secondary or sanctioning rights: The case also with the Prætorian edict; the Prætor only giving actions, exceptions, etc.

This is also the case with almost all obligations correlating with *Jura in re*: and with rights of personal security, etc.

Absolute Obligations are, for the most part, first announced under the description of the acts which amount to violation of them.

Reasons for separating Rights and Obligations ex delicto from the rights, whether in re or ad rem, out of violations of which they arise.

If we attach to the description of each primary Right and Obligation, the description of the rights and obligations which grow out of a breach of it, we must also attach to it a description of the acts which are violations of it; since the conception of these must precede the conception of those. And, to be consistent, we must also tack to each right and obligation *ex delicto* a description of the process, civil or criminal, by which it is to be enforced.²³ Thus (as I have already remarked) losing the advantage of the conciseness which results from treating *together* all such violations as are *susceptible of the same description*, though they are violations of different primary rights; all such rights, etc. *ex delicto* as are susceptible of the same description, though they grow out of different delicts; and all such steps in procedure as are susceptible of the same description, although they are applicable to the enforcement of different rights and obliga-

²³ Another reason is, that *many delicts are complex*; i.e. are violations of several distinct rights.

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tions *ex delicto*. The effect of this *morcellement* would be endless repetition. It would be analogous to the rejection of generic terms.

But if to every primary right and obligation the violation of it, etc. were annexed, the extent of the right in respect of services (so far as settled) would be given in one and the same place: i.e. supposing that the *definitions of Rights* are implicated with the violations of them.

Reasons for separating Rights and Obligations ex delicto from Violations, and each from Procedure.

Scheme (in general)—
'Primary Rights,'
'Violations,'
'Rights *ex delicto*,'
and 'Procedure,' to be severally considered apart.
Reasons for—
Reasons against—
Place for absolute Obligations.

1st. Distinctness of conception is thereby aided. 2nd. The *generalia* of each may thereby be detached; which could not be done, if, to every particular violation, the right, etc. which it generates were annexed; and to this, the particular mode of procedure by which it is asserted and enforced. 3rd. As one and the same act may be a violation of *any of a number* of primary rights (which is a reason for considering 'violations' apart from 'primary rights'), so one and the same Right or Obligation *ex delicto*, may result from *any of a number* of violations; and one and the same mode of procedure be applicable to *any of a number* of such secondary rights and obligations. This last advantage seems to be the second, stated in another manner.

All these parts ought to be considered as *members of one whole*, and bear a common name: whereas the plural, 'Codes,' would seem to oppose them.

It would seem that the definition of primary rights cannot be made complete (not even approximately) without reference to the acts which are violations of them. *Absolute obligations* (as not belonging to either *jura in re* or *ad rem*) cannot be considered under Primary Rights, to which they in a *certain sense* belong.

[*Jus in re* (with its corresponding obligation) is *passive*: i.e. it supposes no obligation on the part of anybody to do, or suffer (by personal intervention). When violated, a right of another sort, in the injured party (or a public officer) against a determinate individual, is generated.

The negative or passive nature of these obligations, may account for their not being noticed. They are merely obligations *to forbear*; and the nature of them is described, *not in conjunction with their corresponding rights*, but under the description of those violations of them (called *delicts* in the narrower sense) which generate obligations *proper*.]

Not only are the obligations which correspond with *Jura in re* established in this indirect manner; but certain of the rights themselves are nowhere described, except under the head of '*delicts*,' or of the Rights and Obligations which they generate.

These are the rights which are not preceded by a *titulus*.

LECTURE XLVI.

ON CERTAIN DISTINCTIONS AMONG THINGS.

AFTER distinguishing primary or principal from secondary or sanctioning rights and duties, I next proceed to subdivide the former division, or that of primary rights.

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The first great distinction among primary rights has been very fully explained in a preceding part of this Course. I allude to the distinction between *dominia* and *obligationes*, as they were called by the classical jurists; between *jura in rem* and *jura in personam*, as they have been styled by modern Civilians. Or rather between *jura in rem*, *jura in personam*, and combinations of rights of the former class with rights of the latter. I introduce this third class to avoid the incongruities into which the Roman Lawyers were led, in the attempt to wrest all rights or collections of rights either into the class of *dominia* or into that of *obligationes*. Those collections of rights, for example, which are called *universitates juris*, or complex aggregates of rights, the Roman Lawyers placed under *dominia*, or *jura in rem*; though it is evident that they commonly include along with rights availing against the world at large, other rights availing against certain and determinate persons.

First great
division of
primary
rights into
rights in
rem and in
personam.

This seems not an improper occasion for adverting to the opinion current among the German jurists of the present day with respect to the arrangement of the Institutes.

A mistake
of modern
German
jurists
respecting
the signifi-
cation of
jus rerum.

According to the Civilians of the 17th and 18th centuries, the *jus rerum* relates to rights in *personam* as well as to rights in *rem*. It is the law or doctrine of substantive rights and obligations as opposed to the law of conditions or persons, and to the law of procedure. But, according to some later German Civilians, the signification of *jus rerum* is narrower. It means the law or doctrine of *dominia*, or rights in *rem*; of real rights: *die Lehre der dinglichen Rechten*. They distinguish the Law of Things from the Law of Persons, and also from the law of Obligations and of Actions; and in this division of the *Corpus Juris*, *jura in personam* belong to the head *Jus Actionum*, not to that of *Jus Rerum*. In the same head they would, if they were consistent, include the Law of Procedure; but they detach this, and place it as a separate head, under the name *jus judicarium privatum*.

I will not trouble you with the reasons which they give for taking this view of the arrangement of the Institutes, nor with my reasons for thinking their opinion unfounded; the question

being one which relates only to the particular legal system, and has nothing to do with the principles of general jurisprudence. I will merely observe, that their opinion seems to me to be contradicted by the announcement at the beginning of the Second Book of the Institutes, of the order intended to be followed in setting forth the *jus rerum*. In this announcement, things are divided into *res corporales* and *res incorporales*; these last being rights and duties (and therefore including *obligationes*, or *jura in personam*); then the work proceeds to treat of *res incorporales*, or rights and duties, under the two divisions of *dominia* and *obligationes*: all this under the head of *jus rerum*. I find also that the opinion of Savigny and of Thibaut concurs with mine; which, joined to the reasons which have occurred to myself, gives me great confidence in my opinion.

In the Prussian Code, *Sachen-recht*, or *jus rerum*, has a meaning still more remarkable. That Code divides the *Corpus Juris*, or that part of it which is called *Privat-recht*, or *jus privatum* (according to the erroneous distinction which I have before adverted to), into two branches, *Personen-recht* and *Sachen-recht*. Under the first head, *Personen-recht*, the law and its expositors naturally treat of rights of both classes, *dominia* and *obligationes*; but by *Sachen-recht*, they mean only the law of *dominia*, while at the same time they treat of *obligationes* incidentally, and as it were in the belly of the opposite class, or that of *dominia*. This is owing to a mistake of the authors of the Prussian Code, which I have pointed out in my printed Tables, viz. their confounding *titulus* with *modus acquirendi*; and, supposing that a *jus in personam* was in all cases merely a step to the acquisition of a *jus in rem*. Now, though *jus in personam* is often only a step to acquiring a *jus in rem* (as in the case of a right by contract to the payment of a sum of money), in many cases it is not so (as in the case of a right by contract to a forbearance from a certain individual). In the French Code, whose authors adopted from the Prussian Code this very mistake, obligations are described in the same incidental manner.

Before I proceed to the detail of primary rights, I shall make a few observations on *things* considered as subjects of rights. I had intended to make some remarks on *facts* or *events*, considered as modes of acquisition, but these I find I shall have better opportunities of introducing, a Lecture or two further on.

Excluding from the word *things*, rights and duties, which are often called by jurists, things incorporeal; the word thing is used by the Roman Lawyers in three distinct meanings.

Taken with the most extensive sense, it embraces every object, positive or negative, which may be the subject or object of a right or duty. Taken with this extensive sense, it embraces (first) any permanent external object which may be the subject of a right or duty, and which is not a physical person, or a collection of physical persons. 2ndly; It embraces persons considered as the mere subjects of rights: that is to say, considered as the subjects of rights residing in other persons, and availing against third persons. In this sense, a slave is styled a thing. 3rdly; It embraces acts and forbearances considered as the objects of rights and duties: that is to say, acts which are to be done or forbearances which are to be observed agreeably to rights or duties. For example, If I am bound by contract to deliver goods, or to refrain from sending goods of a sort to this or that market, the act or forbearance to which I am bound would be styled '*res*,' or a '*Thing*.'

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In a sense more circumscribed, It excludes persons, considered as subjects of rights, and includes only the following objects: 1. Permanent external objects, not being persons, and considered as subjects of rights and duties: 2. Acts and forbearances as subjects of rights and duties.

In a sense which is still narrower, it excludes persons as subjects of rights and duties, it excludes acts and forbearances as objects of rights and duties, and it merely embraces such permanent external objects as fall not within the description of persons, and are actual or possible subjects of rights or duties. This last is nearly the sense which is attached to the term '*thing*' in ordinary discourse or parlance. When we speak of a thing, we usually mean an object which is sensible and permanent, and which is not a person. We contradistinguish it, on the one hand, to fact or event; and we contradistinguish it, on the other, to person, *homo*, or man. Sometimes, however, we take it in a sense which is somewhat narrower. When we speak of a thing, we mean a sensible permanent object which is inanimate.

Sometimes, again, we take it in a sense so extremely extended, that it denotes any object, whether it be actual or possible, real or imaginary, which may become an object of conception, or may be made an object of discourse.

In the language of the English law, it would not appear that the term '*thing*' has any determinate import. The writers who pretend to define it, seem to limit the term to certain classes of rights, and to things properly so called. This, for instance,

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is the case with Blackstone, in the second chapter of his second book. But when they come to the detail, they seem to include under *things*, persons as the subjects of rights, and acts and forbearances as their objects.

For example : A slave is a chattel, and a chattel is a thing : Insomuch that a slave is a thing as comprised in the term chattel, although he is excluded (inconsistently enough) from the import of the term *thing* as explained in a general manner. Again : Blackstone in his second chapter tells us that the objects of dominion or property are *things* : and by things, he there means permanent external objects, not persons. But it appears (from the rest of the second book) that he comprises in dominion or property the whole class of rights which may be styled obligations : that is to say, rights arising directly from contracts and quasi-contracts, together with the rights to redress which arise from civil injuries. And as the objects of obligations are always acts or forbearances, it follows that he includes these in the import of the term *thing*, although he excludes them from his formal definition of them.

In short, the extension of the term *thing* is so extremely uncertain, that if it were expelled from the language of law, much confusion would be avoided. Where it has a definite meaning, it denotes such sensible objects as are subjects of rights and duties. The immediate objects of rights and duties are acts and forbearances. But, in some cases, these acts and forbearances have themselves specific objects with reference to which they are to be done or exercised. *E.g.* Right to conveyance or delivery. Right in a house or field. Right in a slave.

Sensible objects, considered as the subjects of rights and duties, might be styled *things*. Men, as invested with rights, or as bound to acts or forbearances, might be styled *persons* : And the acts or forbearances which are immediately or properly the objects of rights or duties might be distinguished from things and persons. Or the objects about which rights and duties are conversant might be distinguished into *persons*, *objects* of rights and duties, and *subjects* of rights and duties : Meaning by *persons*, men as invested with rights, or as bound to acts or forbearances : Meaning by the *objects* of rights and duties, the acts to be done, and the forbearances to be observed, in pursuance of rights and duties : and meaning by the *subjects* of rights and duties, the sensible and permanent objects which are the objects of those acts and forbearances.

Having made these general remarks on the import of the term '*thing*,' I will now pass in review certain divisions of things which are made in the Roman and English Law.

The distinction between things corporeal and things incorporeal I have already attempted to explain.²⁴

In the Roman Law, things corporeal are permanent sensible objects (whether things or persons) considered as the subjects of rights and duties; and acts and forbearances considered as their objects.

Things incorporeal are rights and duties themselves.

The distinction is utterly useless; inasmuch as rights and duties, having names of their own, need not be styled 'incorporeal things.' And the distinction is either imperfect, or else is big with contradiction. For either forbearances are not ranked with corporeal things, in which case an object of the distinction is omitted: or they are; in which case insensible objects are ranked with sensible.

In the English Law, the same distinction obtains. It is however applied less extensively, and still more inconsistently.

Corporeal hereditaments are such sensible immovable things as are the subjects of heritable rights. Incorporeal hereditaments are certain heritable rights themselves. The term '*Chattels*' is also applied in the same inconsistent manner. *Chattels real* are such rights or interests in corporeal and immovable things as devolve to executors or administrators. Of *chattels personal* some are movable *things* in the proper acceptance of the term, whilst others are rights: namely, rights arising directly from contracts or quasi-contracts, or rights of action. As applied in some cases, the term *chattel* signifies a right; as applied in other cases, it signifies a thing, considered as the subject of a right.

Permanent sensible objects which are not persons, are divided into things movable and things immovable.

Physically, Movable things are such as can be moved from the places which they presently occupy, without an essential change in their actual natures.

Physically, Immovable things are such as cannot be moved from their present places; or cannot be moved from their present places without an essential change in their actual natures. A field is an example of the first. A house, a growing tree, or growing corn is an example of the second.

But things which are physically movable may be immovable

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Distinctions among things in established systems of Law.

1. Corporeal and incorporeal.

2. Movable and immovable.

²⁴ See p. 361, vol. i. *ante*.

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by institution. For example, an heirloom, though physically movable, is immovable by institution. The meaning of which is merely this: that the thing, though physically movable, is arbitrarily annexed to an immovable thing, so as to be considered as a part of it, and to be comprised in its name.

Sometimes the meaning is somewhat different. The movable thing is made the subject of rights which are commonly confined to immovables: *e.g.* Money directed to be laid out in land, and descending to the heir, is impressed with the character of land: *i.e.* descending, though not land, as land itself descends according to the English law.

Another division of sensible permanent things is, into things determined specifically or individually, and things which are merely determined by the classes to which they belong: *e.g.* The field called Blackacre, or *a* field. This or that horse, or *a* horse. A bushel of corn, a yard of cloth, a pound of gold, a given number of guineas; or the bushel of corn contained in such a bag, or the yard of cloth, the pound of gold bearing such a mark, or the ten specific guineas now in your purse.

3. *Res man-*
cipi and
res nec
mancipi.

Things were divided in Roman law into *res mancipi* and *res nec mancipi*. This distinction turns on forms of conveyance. *Res mancipi* were things which could only be aliened by a certain mode of conveyance. If they were not conveyed by the prescribed form, the party could only acquire them by *usucapion*, working on his actual possession. The mere conveyance imparted no interest to him.

4. Things
deter-
mined
specifically
and things
deter-
mined
by their
kind.

Things are either determined specifically or individually, or they are merely determined by the kinds to which they belong. You may be bound to convey to me *the* field called *Blackacre*, or *a* field; *the* particular horse in *your* stable, or *a* horse of a certain description; *a* bushel of corn; *a* yard of cloth; *a* pound of gold; *a* given number of guineas; or *the* bushel of corn in such a bag; *the* yard of cloth; *a* pound of gold bearing such a mark; *the* ten guineas in your purse.

In the language of the Roman Lawyers, a thing individually determined is styled '*species*.' A thing which is merely determined by the class to which it belongs, is styled '*genus*.' Sometimes, *genus* signifies the class of things, and the indeterminate individual belonging to the determined class is styled '*quantitas*:' though the term *quantitas* is usually limited to such indeterminate things of determinate classes as *mensura*, *numero*, *vel pondere constant*: As, to *a* bushel of corn, *a* pound of gold, and so on. The thing is determined by mensuration as well

as by kind, although it is not determined specifically or individually.

The terms *species* and *genus*, in the language of jurisprudence, have therefore a meaning different from that which they bear in the language of logicians. In the language of logicians, a *genus* is a larger class, and a *species* is a narrower class contained by the *genus*. As animals are a *genus*, men are a *species* of animals.

In the language of jurisprudence, *genus* denotes a *class* (whether it be a *genus* or *species* in the language of logicians), or it denotes an individual or portion not specifically determined, belonging to a determined class. Hence the expression, 'specific legacy, specific performance.' In the language of logicians, it would signify something totally different. A specific legacy would be a gift of an indeterminate something belonging to a determinate class.

Again, specific performance would mean something totally different from what it actually denotes. It would not mean a performance of an obligation in the very terms of it; for instance, by conveying *that* specifically determined house; but would be equally applicable if I merely conveyed *a* house, or something standing in lieu of one. I therefore conceive that this use of the word specific corresponds to the term *species* of the Roman jurists, with whom *species* always meant an individual.

Allied to the distinction between *species* and *genus*, or *species* and *quantitas*, is the distinction of things into fungible and not fungible.

5. Fungible and not fungible.

Where a thing which is the subject of an obligation (*i.e.* which one man is bound or obliged to deliver to another) must be delivered *in specie*, the thing is not fungible: *i.e.* that very individual thing, and not another thing of the same or another class, in lieu of it, must be delivered.

Where the subject of the obligation is *a* thing of a given class, the thing is said to be fungible: *i.e.* the delivery of any object which answers to the generic description will satisfy the terms of the obligation. 'In genere suo functionem recipiunt.' Meaning that the obligation is performed by the delivery of *genus* or *quantitas*. 'Una fungitur vice alterius.' In the language of the German jurists, fungible things are styled '*vertretbar*'—representable. This expression is perhaps better than the other. A fungible or representable thing is a thing whose place, lieu, or room, may be supplied by a thing of the same kind, or even by a thing not of the same kind, as money in the form of damages.

Things are fungible or not fungible, not in their own nature, but with reference to the terms of the given obligation. Otherwise, any thing of any class may be either fungible or not. A man may devise a farm, or a house, though it is not likely he would do so, and though the bequest would probably be void by reason of uncertainty. But, in the writings of the Roman Lawyers, there are actual instances of facts of the kind.

Fungible things are generally confounded with things *quæ usu consumuntur* because these, for obvious reasons, are usually sold *in genere*, not *in specie*. But these things may be the objects of a specific obligation, as the others may of generic. I may be bound to deliver to you, not only so much wine, but that specific parcel of it now lying in my cellar, and in such a corner of it. The distinction does not arise from any physical difference in the nature of the things, although there are some things which are most naturally sold *in genere*, and others of a permanent kind most naturally sold *in specie*.

This distinction is of considerable importance in practice with reference to performance *in specie* or recovery *in specie*. Almost the only ground for enforcing specific performance is, that nothing else can completely supply the place of that very thing for which the party contracted. Where it can, there is no reason for enforcing the contract *in specie*.

In English Equity, a specific delivery is not enforced unless the subject of the contract is land. There is one case on the books in which it was enforced in the case of a contract for iron; but I never could understand on what ground. Contracts to deliver movable objects have been specifically enforced, because the objects were of so peculiar a nature that they could not be replaced. Such was the case of the Pusey horn, an object so specific and so completely *sui generis*, that the party never could have replaced it. But in the case of iron I never could understand the motive; money in the form of damages would have sufficed as completely as it can in any case. The distinction is also of importance with reference to recovery *in specie*, where a party has been wrongfully dispossessed of a specifically determined thing. Neither is specific delivery enforced by our common law, unless by the action of *detinue*, and there the alternative is always allowed. The analogous action of *trover* is merely for damages.

Things are again divided into *res singulæ* and *universitates rerum*; things which are themselves individual and single, and cannot be divided without completely destroying their actual nature,

and lots or collections of individual things. A sheep belongs to the first class, a flock of sheep to the second. This is not a distinction without a difference. If a man contracts to deliver so many sheep, and if he contracts to deliver a flock consisting of that number of sheep, his legal position is not the same in the two cases. If some of the sheep die in the interval, he must yet, in the first case, deliver the stipulated number; in the second, he need not, because you bought them in the gross.²⁵

The only reason for defining and distinguishing things in the law, or in the expositions of it, is in order that dispositions of things and contracts relating to them may thereby be facilitated; that parties may know the effect of using such and such expressions in contracts and conveyances. It is important that the meaning of such terms as *messuage*, for instance, should be practically settled, in order that the import of the words used in a contract, for example, may be exactly known. There are several cases in our law books turning on that very question.²⁶ What does a party dispose of, by disposing of his furniture, or by disposing of all his effects? The law must determine: that is, must determine the meaning it will attach to the words if the parties have not explained clearly the exact meaning which they annex to them, so that a party may exactly know what construction in the courts of justice will be put upon those names.

Bentham, in his *Vue générale d'un Corps complet de Droit* (*tit. 'Des Choses'*), has not, so far as I can observe, at all improved upon the old distinctions, extremely imperfect as they undoubtedly are; and he has even misapprehended some of those distinctions. He first divides things into *choses naturelles* and *choses artificielles*, a distinction of which I cannot perceive the purpose. Next into *movable* and *immovable*, an old distinction. Next into things *consumable* and things which may be used with-

²⁵ Intermediate between the two cases is a contract such as the sale of cotton to arrive according to the usage of the Liverpool market at that stage of the transaction where the bales have been invoiced, but not weighed over. It is a sale of specific bales with an implied engagement to replace any that may be lost or damaged with others of the quality specified. The precise nature of the contract becomes important when a question arises as to *periculum rei venditæ*. In the contract here instanced it appears to be the understanding of the market that the risk is transferred

on the bales respectively being weighed over or 'passing the scale.' The Queen's Bench (Michaelmas Term, 1868) refused to disturb a verdict given in accordance with this understanding.—R. C.

²⁶ 'What is part of a house' has of late years formed a fruitful subject of legislation, owing to the 92nd section of the L. C. C. Act, 1845. The most recent cases on the subject are *Steele v. Midland Railway Company*, L. R. 1 Ch. 275, and *Marson v. London, Chatham, and Dover Railway Company*, L. R. 6, Eq. 101.—R. C.

out being consumed, which is the vulgar or erroneous notion of the distinction between things fungible and not fungible.

The distinction of the Roman Lawyers between species and genus, or between things determined individually and things determined by their kinds, he expresses thus: 'things valued individually and things valued in mass.'

In our conveyances, we make up for the indefiniteness of the general description, by attaching to the term which ought to convey the whole meaning, a list of as many of the parts which fall under it as we can think of; a sort of drag net, to comprehend everything which happened to be omitted out of the comprehension of the one general name. This would be avoided if the exact import of those single names were specially determined by the legislator.

NOTES.

Quantitas quæ pondere aut mensurâ constat: a determinate quantity (determined, that is, by weight or measure) of an inorganic substance.

Quantitas quæ non constat;—a determined quantity (determined, that is, by the number of individuals) of organic individuals. Any such quantity is *individuum vagum*. An assigned quantity of the sort is *species*.

A quantity of the first sort may be resolvable into organic individuals, but organic individuals which, for the purposes of commerce, are never considered in that character; as, e.g. grains of corn. *Numerus*, on the contrary, is made up of individuals, which, for the purposes of commerce, are considered as such: i.e. are counted; e.g. Sheep.—*Marginal Note in Hugo, Enc. p. 324.*

'Thing' and 'Produce' are clearly relative terms. That which is produce with reference to some given subject (as, for instance, growing fruit with reference to the tree upon which it grows (becomes a substantial or independent thing so soon as that relation ceases (e.g. by severance). Earth made into bricks, or fruit taken from a tree, cease to be produce or integrant parts of land, and pass into the class chattels. And again (as the bricks, for instance) may, by composition, become integrant parts of another subject.—*Marginal Note in Blackstone, vol. iii. ch. 14.*

Inquirenda: How to define the subject of a Right, or, more briefly, a Thing?—What is comprised in the subject itself? What is to be understood by its appurtenances? What is to be understood by its produce or profits? What is to be understood by the uses or services to be derived from it? By produce or profits are we to understand periodical accretions—substances which, though removed

from the subject, are reproduced *in genere*? If so, how can minerals be profits or produce? and why are trees part of the inheritance? In the case of land, etc. every such object, perhaps, is comprised in the subject, as it has an indefinite duration and cannot be removed from it without severance.—*Marginal Note in Blackstone*, vol. ii. ch. 1.

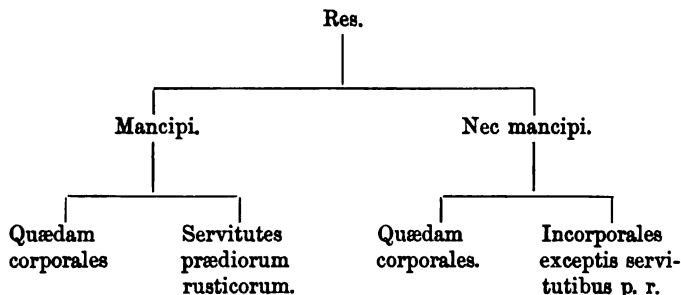
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A *university*, or *collection of Things*, what? Must be distinguished from a university of *Rights* or *Obligations*. A university of *Things* is not the subject of *universum jus*. It is a collection of *physical* things (whether the individual things be simple or composite); is itself a legal *individuum*; and is, therefore, not the seat of an *universitas juris*.

‘Magna autem differentia est Mancipi rerum et nec Mancipi. Nam res nec Mancipi nuda traditione abalienari possunt, si modo corporales sunt et ob id recipiunt traditionem.

‘Mancipi vero res sunt quæ per mancipationem ad alium transferentur,’ etc.—*Gaius*, lib. ii. § 19.

The difference assigned by *Gaius* is a difference of properties or accidents: that is, a difference between the modes in which things of these sorts were respectively aliened or conveyed. That difference between the two classes which was the cause or source, is not even adverted to.—*Marginal Note and Table in Gaius*.



LECTURE XLVII.

ON THE FIRST GREAT DIVISION OF JURA IN REM, OR THE
DISTINCTION BETWEEN *DOMINIUM* AND *SERVITUS*.

HAVING indicated the leading divisions which I give to the Law of Things (or to the Law *minus* the Law of Persons), I now proceed to the first department of the latter: namely, ‘Primary rights, with primary *relative* duties.’

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Of the duties which I style *absolute* (or of the duties which have no corresponding rights), many are *primary* or *principal*,

Primary rights, with primary relative duties.

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Postpone-
ment of
primary
absolute
duties.

or are *not* effects or consequences of delicts or injuries. Consequently, they ought, in logical strictness, to be placed in the first department of the Law of Things. But for reasons which I hint at in my Outline,²⁷ and which I shall produce in a subsequent Lecture, I think it commodious to place absolute duties in that department of the Law of Things which is concerned with the rights and duties that I style sanctioning or secondary: namely, in that *sub-department* of that second department, which I give to the consideration of crimes and their various consequences.

Distribu-
tion of
primary
rights
under four
sub-de-
partments.

In treating of primary rights, with their corresponding primary duties, I shall distribute them under four sub-departments: the ground or *rationale* of which distribution may be found in the following considerations:

It will be found on examination (as I stated in my earlier Lectures), that every right, simple or complex, is *jus in rem* (or a right against persons generally), *jus in personam* (or a right against a person or persons specifically or individually determined), or a combination or compound, more or less complex, of *jus in rem* and *jus in personam*.

Accordingly, I divide primary rights (including their corresponding primary duties), into the four following sub-departments. 1. Rights *in rem* as existing simply, or as not combined with rights *in personam*. 2. Rights *in personam* as existing simply, or as not combined with rights *in rem*. 3. Such combinations of *jus in rem* and *in personam* as are less complex. 4. Such more complex aggregates of *jura in rem* and *in personam* as are styled by modern Civilians *universitates juris*, or universities of rights and duties.

This divi-
sion, why
preferable
to that of
the Roman
Lawyers.

This order is somewhat different from that of the institutional treatises of the Roman Lawyers, and from that of those modern Civilians who have followed the method of those treatises. By them, the matter of the law of things is divided into *dominia* (in the largest sense of that term) or *jura in rem*, and *obligationes* or *jura in personam*. And *dominia* in the largest sense of the term are again divided into *dominium rei singulæ*, *jura in re aliend*, and *universitates juris*. The first of these three comprehends rights of property, strictly so called; the other two include all other *jura in rem*. *Obligationes* are divided into *obligationes ex contractu*, *quasi ex contractu*, and *ex delicto*.

This division appears to me very incorrect. A man's inheritance or patrimony, for instance (which is a *universitas*

²⁷ See p. 66, vol. i. *ante*.

juris), includes both *jura in rem* and *jura in personam*, because rights of both sorts devolve on universal successors. It is much more correct, therefore, as well as more convenient, to distinguish primary rights into *jura in rem*, *jura in personam*, and aggregates more or less complex of rights of both kinds. And according to the arrangement of the Roman Lawyers, many rights which are truly combinations of rights *in rem* and rights *in personam*, are scattered through the *corpus juris* under those various heads.

For example, the right conferred by a mortgage, is a combination of rights *in rem* and rights *in personam*. So is the right conferred by a *sale*, completed by delivery, at least under some circumstances. If accompanied by a warranty, express or tacit, of the soundness of the title, it does not confer *jus in rem* simply, or *jus in personam* simply. The sale completed by delivery, passes a right in the thing sold, which avails against the world in general, but, by the warranty, there also accrues to the buyer, a right availing against the seller determinately or exclusively.

Even by my own method the distinction between the classes of rights is not complete, and they cannot by any method be kept quite separate. Under the head of *universitates juris*, we cannot avoid referring forward to obligations arising from injuries: for many rights arising from injuries often devolve from Testators, Intestates or Insolvents, to those who take *per universitatem*.

And here I will advert to a difficulty which arises out of an observation of mine in a former Lecture. I said that all duties are such as answer either to rights *in rem* or to rights *in personam*: and I added that the duties answering to rights *in rem* are always negative, or are duties to forbear. To this it has been objected by one of my hearers, that there are positive duties lying on persons generally: *e.g.* A duty, incumbent on the community generally, to pay a tax imposed by the sovereign government: Or a duty incumbent generally on persons of a certain age to render military service. But in all these cases, the duty, assuming that it lies on persons generally, is absolute. There is no determinate person, physical or complex, towards whom the duty is to be observed: or the only person, physical or complex, towards whom the duty is to be observed, is the sovereign government of the given community. And, for reasons which I have produced in my published Lectures, we cannot say with propriety of a sovereign government, that it has legal rights against its own subjects. The division which I was alluding to when I made the observation in question, was a

An objection to a former position examined.

Positive duties (or duties to do or perform) which lie upon persons generally and indeterminately.

division of relative duties merely, that is of duties answering to rights residing in determinate persons; and every relative duty does answer either to a *jus in rem* or to a *jus in personam*.

And here I may remark, that relative duties are the only duties which are noticed in the Institutional writings of the Roman lawyers: the reason of which is, that they are a treatise on *private law*: i.e. excluding political *status*, and criminal law, under the name of *public law*.

Now absolute duties would naturally (according to this arrangement) come within the province of *public law*. The duties imposed by the Government, and to be performed towards the Government, would fall under the law of political *status*: the purely absolute duties to be performed towards no determinate persons whatever, would fall under criminal law, to which they would either be prefixed by way of preface, which would in my opinion be the preferable order, or would be described implicitly, in the description of crimes and of their corresponding punishments.

Rights in
rem as ex-
isting per
se, with
reference
to differ-
ences be-
tween their
subjects.

In treating of rights *in rem* as existing simply (or as not combined with rights *in personam*), I will first touch upon them briefly, with reference to differences between their *subjects*, or between the aspects of the forbearances which may be styled their objects.

In relation to rights of the class as considered from this aspect, I have said in my Outline:²⁸

‘The expression *in rem*, when annexed to the term *right*, does not denote that the right in question, is a *right over a thing*. Instead of indicating the nature of the subject, it points at the compass of the correlating duty. It denotes that the relative duty lies upon persons generally, and is not exclusively incumbent upon a person or persons determinate. In other words, it denotes that the right in question *avails against the world at large*.

‘Accordingly, some rights *in rem* are rights over *things*: others are rights over *persons*: whilst others have *no* subjects (persons or things) over or to which we can say they exist, or in which we can say they inhere.—For example: Property in a horse, property in a quantity of corn, or property in, or a right of way through a field, is a right *in rem* over or to a *thing*, a right *in rem* inhering in a *thing*, or a right *in rem* whereof the subject is a *thing*.—The right of the master, against third parties,

²⁸ See pp. 46, 47, vol. i. *ante*.

to his slave, servant, or apprentice, is a right *in rem* over or to a *person*. It is a right residing in one person, and inhering in another person as its subject.—The right styled a monopoly, is a right *in rem* which has no subject. There is no specific subject (person or thing) over or to which the right exists, or in which the right inheres. The *officium* or common duty to which the right corresponds, is a duty lying on the world at large, to forbear from selling commodities of a given description or class: but it is not a duty lying on the world at large, to forbear from acts regarding determinately a specifically determined subject. A man's right or interest in his reputation or good name, with a multitude of rights which I am compelled to pass in silence, would also be found, on analysis, to avail against the world at large, and yet to be wanting in persons and things which it were possible to style their subjects.

'I shall therefore distinguish rights *in rem* (their answering relative duties being implied) with reference to differences between their *subjects*, or between the aspects of the forbearances which may be styled their *objects*. As distinguished with reference to those differences, they will fall (as I have intimated already) into three classes.—1. Rights *in rem* of which the subjects are things, or of which the objects are such forbearances as determinately regard specifically determined things. 2. Rights *in rem* of which the subjects are persons, or of which the objects are such forbearances as determinately regard specifically determined persons. 3. Rights *in rem* without specific subjects, or of which the objects are such forbearances as have no specific regard to specific things or persons.'

In explaining, in my earlier Lectures, the nature of the distinction between *jus in rem* and *in personam*, I cited numerous examples of rights in the former class which have no specific subjects (persons or things). And it, therefore, will not be necessary to adduce examples here.

With regard to *jura in rem*, which are rights over persons, I would observe that all (or nearly all of them) are matter for the Law of Persons and the Law of *Status*. Such, for example, is the case with the right of the master to the slave; the right of the master in the servant; the right or interest of the parent or husband in the child or wife; and the right or interest of the child or wife in the parent or husband. In these, and various other cases, the right is *jus in rem* (or a right availing against the world at large) of which the subject is a person.

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But in each of these cases, the right is a constituent element of a *status* or condition, and therefore is appropriate matter for that appendix or supplement which is styled the Law of Persons.

The only right in or over a person which seems appropriate matter for the Law of Things, is what may be called a man's right in his own person or body: that is to say, a man's right to enjoy and dispose of (free from hindrance by others) his bodily organs and powers, in so far as such enjoyment and disposition consist with the rights of others, or (generally) with any of the duties incumbent on himself.

This right (which, as I shall shew hereafter, may be likened to property or dominion in a thing, strictly so called) is properly matter for the Law of Things, or for *the* Law exclusive of the law of *status*. Instead of being parcel of a *status* or condition, it resides in every person (who has any rights at all) by the mere fact of his living under the State, or within the protection which it yields to those who are living under its jurisdiction.

And here I will make an observation upon Blackstone's division of those rights which are commonly called *natural* or *inborn*, and by him *absolute* rights. He divides them into the right of *personal security* (including the right to the enjoyment of life, limbs, bodily health, and reputation), the right of *personal liberty* (that is, a man's right to move his body from place to place at his pleasure, as far as he can do so consistently with his legal obligations); and, lastly, the right of *private property*, which is in truth no right, but a collective name for all the rights with which his Commentaries are conversant.²⁹ He should (I think) have included right of personal liberty, in the sense in which he understands it, under the head of right of personal security, or right in a man's own person. For it is merely the power of disposing of one's person consistently with the rights of others, and with duties lying on one's self. And, on the other hand, the right to reputation, which seems to have no immediate connection with a man's own person or body, ought not to have been included in the right of personal security, but ought to have been co-ordinated with it.

Inborn or natural rights (or rights residing in *all* without a *special* title), would therefore fall into two kinds: namely, right to personal security, or right in one's own body, and the right to one's reputation or good name.

Perhaps, however, by the right to liberty he does not mean the mere right to the enjoyment and disposition of one's person

Right to
liberty,
what?

²⁹ See Table VIII. *post*.

or body, but every right to do or forbear which is not comprehended by other specified rights.

Political or civil liberty is properly the mere liberty from legal obligation left by a Government to its own subjects, which liberty the Government may or may not couple with a legal right to it. When it does so couple it, the liberty may or may not be part of some specified right: if it be, it falls within the description of that right. If not, then the right to liberty is any right to do or forbear, which is not comprehended by any other specified right whatever. For example, the right to publish one's opinions freely is not specified anywhere as a particular right, and therefore falls under the vague term right to liberty. There are a multitude of rights in that predicament; they must necessarily be left under the vague general description of rights to liberty. The only way to determine what the right is, is by determining what act would be a violation of it. If you know what act would be an infringement of your right of liberty, you know to that extent what the Government has given you liberty to do. As against the Government itself you can have no legal right; as has already been sufficiently shewn.

In treating of rights *in rem* as existing simply (or as not combined with rights *in personam*), the only rights which I shall consider directly are, rights over *things*, in the strict acceptation of the term: that is to say, such permanent external objects as are not persons. Rights *in rem* in or over persons, and rights *in rem* which have no subjects, I shall touch incidentally (in so far as I may find it necessary to advert to them), as I treat of rights of the class in or over things.

Rights *in rem* over things, the only rights which I shall treat directly.

Of the various distinctions between rights *in rem* over things, the first to which I address myself, is the distinction which I must mark, for the present, by the ambiguous and inadequate names of *dominium* and *servitus*, or *property* and *easement*.

Distinction between property or dominion, and easement or *servitus*.

I have stated in my Outline, the nature of the distinction to which I am now adverting.³⁰ In my next Lecture I shall attempt to explain it, as accurately as my time will allow. And attempting to explain that distinction, I shall proceed in the manner marked out in my Outline.³¹

Before I close the present Lecture, I will make a few remarks upon the various meanings of the very ambiguous word 'Property' or 'Dominion.'

Various meanings of 'property' or 'dominion,' etc.

³⁰ See Outline, p. 47, vol. i. *ante*.

³¹ See Outline, p. 49, vol. i. *ante*.

1. Taken with its strict sense, it denotes a right—indefinite in point of user—unrestricted in point of disposition—and unlimited in point of duration—over a determinate thing. In this sense, it does not include *servitus*, nor any right of limited duration. Sometimes it is taken in a loose and vulgar acceptance, to denote not the right of property or dominion, but the *subject* of such a right; as when a horse or piece of land is called my property.

2. Sometimes it is applied to a right indefinite in point of user, but limited in duration: for instance, in common parlance, a life interest in an immovable is a property.

3. Sometimes the term 'right of property' or 'dominion' is opposed to a right of possession (which will be analysed hereafter); that is, to a right over and in a determinate thing, which arises from the fact of an adverse possession. As opposed to this, the term 'right of property' almost comprises *servitus*; for it means, not a right distinguished by indefiniteness of user, but a right (either property or servitude) which is not a right of possession: a complete right as against the world, as distinguished from a right against all the world *except* a determinate person or party who has properly the right *in* the subject; as when we say, that the right of possession ripens by præscription into dominium or property: and we say so even when the right acquired is a *servitus*.

4. In the language of the classical Roman jurists, the term *proprietas*, or *in re potestas* or *dominium*, has two principal meanings. It is either a right indefinite in point of user, over a determinate thing: or, generally, *jus in rem*. In the first sense, it is opposed to *servitus*; and these form the two divisions of rights availing generally against the world. In the second or larger and vaguer sense, it includes all to which in the first sense it is opposed; all rights not coming within the description of *obligatio*.

5. I think in English law, unless used vaguely and popularly, the term property is not applied to rights in immovables. We talk of property in a movable thing. By absolute property in a movable thing we mean what the Roman lawyers called *dominium* or *proprietas*, they having no distinction between real and personal property. But, in strict law language, the term is not applied to a right or interest in immovables. An estate in fee simple, an estate in tail, an estate for life and so on, but never a property, speaking strictly. An estate in fee-simple corresponds as nearly as may be to absolute property in a personal chattel.

6. Another strange caprice of language is the following. The term property is applied to some rights *in rem* over or in persons but not to others. For example, the right of the master in the slave is called *dominium* in the Roman law and property in the English. The former word seems to have originally been applied exclusively to that right; to have been co-extensive with *dominus*, and to have extended only by analogy to things strictly so called. But in neither the Roman nor the English law is the analogous right of the father in his son included under the same name. So a man's right in his own person; it has been called a right of personal security, but never a property in his own person. This is analogous to the capricious application of the term thing. A slave in the Roman law was styled a thing, because he was the subject of a right residing in his master and availing against third parties, and was so far in a position analogous to that of a thing strictly so called. But the Roman lawyers did not call a son (though also in the power of his father and almost as completely subject to him as a slave) a thing: nor did they call the action by which the father might have recovered the son a *vindication*; which is the name peculiarly applicable to cases in which a right of property or *dominium* has been violated.

7. Another meaning of the word property is the aggregate of a man's faculties, rights, or means; called in the Roman law a man's patrimony: at least that name is given to such part of the aggregate, as descends to his general representatives on his decease, or is applicable to the discharge of his obligations if he be insolvent. It is tantamount to the term *estate and effects*, or perhaps to the term *assets*. In this sense it implies rights *in personam*, or obligations as well as rights of every other class. It is evident that a man's rights as against determinate persons are just as much applicable to the discharge of his debts, and devolve just as much to his general representatives as his *jura in rem*.

8. A still more remarkable acceptance is the following. In the largest possible meaning, property means legal rights or faculties of any kind; as when we talk of the institution of property; or of security to property as arising from such and such a form of Government or the like. It is commonly said that Government exists or should exist to institute and protect property. I have demonstrated in a note to my published Lectures, the absurdity of this doctrine.³² But the property

³² See note, p. 292, vol. i. *ante*.

here spoken of must mean legal rights in the largest sense. It cannot be meant that Government exists or ought to exist for the purpose of creating and protecting rights of dominion in the narrower sense, else it would be implied that it ought not to exist for the purpose of protecting rights arising from contracts and *quasi*-contracts.

When we speak of a man of property, meaning a wealthy man, we seem chiefly to contemplate the value of his rights in external things, or of the debts due to him; the most conspicuous portion of his rights. Blackstone uses the term in that vague, vulgar, and unscientific sense, in the part of his work where he announces the arrangement of his second book. He there says that the law of things is conversant about rights of property or *dominium* which he explains to mean the rights which a man may acquire in and to such external things as are connected with his person. He here manifestly means by property and *dominium*, not property and *dominium* in their strict, nor in any of their narrow senses, but in this large sense. For, lower down, he includes in the law of things, or the law of property or *dominium*, not only property in possession, absolute and qualified, or absolute and qualified property divested of possession by wrong, but also whole classes of rights arising directly from contracts or *quasi*-contracts, which are not rights over things at all, but rights to acts and forbearances to be done and observed by determinate persons. Thus if you contract to sell me a determinate quantity of corn, I have no property or dominion in the thing, but a right to force you to deliver corn according to the terms of the contract. If you have disposed of the subject of the right in the meanwhile to a third party, the property vests in the buyer, not in me. If the property vests in me before delivery, the transaction is not a contract, but compounded of a conveyance and a contract. Blackstone, therefore, must here use the word in a totally different sense from that in which he employs it afterwards. In fact, he here means by it a man's legal rights generally, or his faculties generally.

The same may be said of what, under the head of the rights which he styles absolute rights, he terms the right of private property. What this might be, I could not for a long time make out: but by comparing it with a corresponding passage in his third volume, it was cleared up. I could not persuade myself that it meant nothing. I now find that it does. It is merely a collective name for all those various rights which, either as property in the strict sense, or as rights derived from

contracts or quasi-contracts, are the subject of his whole Commentaries, and does not stand for a particular right at all.

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These are only some of the meanings of this most ambiguous word. It is most difficult to get on with it intelligibly and without endless circumlocution. For the present I mean by property or dominion, every right in and over a thing, which is indefinite in user, as distinguished from *servitus*. The various modes of *dominium* or property as thus understood, I shall shew as I proceed.

LECTURE XLVIII.

DOMINIUM AND SERVITUS.

IN my last Lecture, I proceeded to the first of the two capital departments under which I arrange or distribute the matter of the Law of Things (or the matter of the bulk or mass of the legal system): namely, primary rights, with their corresponding primary duties.

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Recapitulation.

Adverting to primary rights (or to rights which are not consequences of delicts or injuries), I proceeded, in the first instance, to rights *in rem* (or rights availing against the world at large) as existing *per se* or simply: that is to say, as not combined with rights *in personam*, or rights availing exclusively against specifically determined persons.

Adverting to rights *in rem*, as existing *per se* or simply, I first considered them with reference to differences between their respective *subjects*: or (changing the expression) with reference to differences between the aspects of the forbearances which may be styled their objects. I touched upon the rights of the class of which the subjects are *things*, or of which the objects are such forbearances as determinately regard specifically determined things. I noticed the rights of the class of which the subjects are *persons*, or of which the objects are such forbearances as determinately regard specifically determined persons. And I adverted to the rights of the class which have *no* specific subjects, or of which the objects are such forbearances as have *no* specific regard to specific things or persons.

Dismissing the rights of the class of which the subjects are *persons*, and also the rights of the class which have *no* specific subjects, I proceeded to such distinctions between rights of the class over *things* as are founded on differences between the

degrees wherein the entitled persons may use or deal with the subjects.

I adverted generally to that leading distinction of the class which may be marked with the opposed expressions, *dominion*, *property*, or *ownership*, and *servitude* or *easement*. And to obviate some of the difficulties which arise from the ambiguities of the expression, I stated some eight or ten of the many and disparate meanings, which, in popular language, and even in the writings of lawyers, are annexed to the term *property* and the term *dominion*.

Distinction between dominion or property and *servitus* or *easement*.

Pursuing my examination of the distinction, which, for want of better names, I marked with the opposed expressions to which I have now adverted, I would remark that I mean by *property* (as opposed to *servitus* or *easement*) any right which gives to the entitled party an indefinite power or liberty of using or disposing of the subject: or (in other words) which gives to the entitled party such a power or liberty of using or disposing of the subject as is not capable of exact circumscription; as is merely limited generally by the rights of all other persons, and by the duties (relative or absolute) incumbent on himself.

And by *servitus* or *easement* (as opposed to *property* or *dominion*) I mean any right which gives to the entitled party such a power or liberty of using or disposing of the subject as is defined or circumscribed exactly.

An estate in fee simple in land, absolute property in a personal chattel, or an estate or interest for life or years in land or a personal chattel, are all of them cases of *property* or *dominion* (taking the expression in the sense which I am now giving it).

A right of way through land belonging to another, a right of common (or of feeding one's cattle on land belonging to another), or a right to tithe (or to a definite share in the produce of land belonging to another), are all of them cases of *servitus* or *easement* (as I now understand the expression).

Whoever has a right of property may apply the subject of his right to any purpose or use which does not amount to a violation of any right in another, or to a breach of any duty lying on himself. And it is only in that negative manner that the extent of the power of user imported by the right can possibly be determined.

But in the case of a right of servitude, the purposes or

uses to which the person invested with the right may apply the subject, are not only limited generally by the duties incumbent upon him, but are determined or may be determined by a positive and comprehensive description.

In a word, *servitus* or easement gives to the entitled party, a power or liberty of applying the subject to exactly determined purposes. Property or dominion gives to the entitled party, the power or liberty of applying it to *all* purposes, *save* such purposes as are not consistent with his relative or absolute duties.

I would briefly remark (before I proceed) that in treating of the distinction now in question, I suppose that the right of the party is present or vested, and is also accompanied with a right to the present enjoyment of the right, or to the present exercise of it. To the nature of contingent rights, and of such vested rights as are not coupled with a right to present enjoyment or exercise, I shall advert hereafter.

Property or dominion (used with the meaning which I am now annexing to the term) is applicable to any right which gives to the entitled party an indefinite power or liberty of using or dealing with the subject. But property (as thus understood) is susceptible of various *modes*: that is to say, the limitations or restrictions to that power or liberty, which spring from the rights of others and from the duties incumbent on himself, may vary to infinity.

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modes.

For example: A right of unlimited duration (as an estate in fee-simple in land, or absolute property in a personal chattel) and a right of limited duration (as an estate for life or years in land or a personal chattel) are equally *property* (in the present sense of the expression): for, in either case, the power or liberty of user which resides in the entitled party, is not susceptible of positive and exact circumscription.

But the limitations or restrictions to that indefinite right of user, are, in the different cases, widely different.

In the case of the estate in fee, or the absolute property in the personal chattel, the owner may waste or destroy the subject, in so far as such waste or destruction may not be injurious to other persons considered generally.

In the case of the estate for life, or of the estate for years, this power or liberty is restrained, not only by the rights of others considered generally, but by the rights in the same sub-

ject of those in remainder or reversion: that is to say, who have rights in the same subject, subsequent to the rights of the owner for life or the owner for years. For if the owner for life, or the owner for years (I know how uncouth this phrase sounds to an English lawyer, but I have given my reason for selecting it), had the same power of user which resides in the absolute owner, it is clear that the rights of those who are in remainder or reversion would be merely illusory. In respect of *their* rights, he, at least, must be subject to the duty of not destroying the subject, or of so dealing with it as would render it absolutely worthless.²³

But the restrictions to the right of the limited owner, which arise from the rights of the remainderman or reversioneer, may also be fixed differently by the absolute dispositions of the law, or by private dispositions which the law allows and protects. We may suppose, for example, that the owner for life of land may be empowered to divest it completely of timber and buildings, and to leave nothing to his followers but the bare soil; Or that his power of taking timber, and demolishing buildings, may be more or less restricted.

In our own law, in the Roman and French law, and (no doubt) in every other system, the power over a thing residing in a person having in it an interest limited in point of time is not only restricted in duration, but in regard of the interests of the following takers, is restricted in a great variety of ways. For instance, the right of a tenant by the courtesy, and that of a tenant in dower in the English law, are different. An estate for life, again, may be given subject to waste generally, or free from the restrictions which the Courts of Equity have annexed even to grants without impeachment of waste: for instance, the restriction of not cutting down ornamental trees and the like, for I take this provision of equity to be only dispositive, that is, intended to take effect only if the parties should not otherwise provide.

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But though the possible *modes* of property are infinite, and though the indefinite power of user is always restricted more or less, there is in every system of law, some one mode of property in which the restrictions to the power of user are fewer than in others: Or (changing the expression) there is some one mode or property in which the power or liberty of indefinite user is more extensive than in others. And to this mode of property,

²³ Blackstone, vol. ii. pp. 122, 280, 381, 397; vol. iii. pp. 223, etc.

the term dominion, property, or ownership is pre-eminently and emphatically applied.

Such, for example, in the Roman law, is *dominion* (in the strict sense): such, in the French law, is *propriété* (in the same sense): such, in our own law, is absolute property in a movable. Such, too, in our own law, is an estate in fee-simple in land: but which (although it is closely analogous to absolute property in a movable) is not commonly called property or ownership.

The right of property pre-eminently so called (or the mode of the right of property which is coupled with the largest power of user) is (for the reasons to which I have just adverted) a right of unlimited duration: that is to say, there is no person having any interest in the subject subsequent to his own, from whom the owner may not divert it by a total or partial alienation. Let the contingent successors be who they may (whether they succeed by private and particular dispositions, or by general dispositions of the law taking effect in default of particular dispositions), they have no such right in the subject as the owner may not defeat, and as sets a restriction or limitation to his power of using the subject.

This I apprehend (speaking generally) is the notion of property unlimited in duration, and therefore the most extensive of any in respect of the power of user. In strictness, it is not a right of unlimited duration: for no right can endure longer than the life of the party entitled. But it implies³⁴ a power of aliening the right itself, from the successors who would take it (by particular disposition, or by the general disposition of the law) in case the owner died without alienation. To this I shall advert particularly, when I come to consider rights in regard to their respective durations.

Even the right of property pre-eminently so-called (or the right of property whose duration is unlimited) is not unlimited in respect of the power of user which resides in the proprietor. The right of user (with the implied or corresponding right of excluding others from user) is restricted to such a user, as shall be consistent with the rights of others generally, and with the duties incumbent on the owner.

For example: I may exclude others generally from my own land or house: but I cannot exclude officers of justice, who, authorised by a warrant or other due authority, come to my

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user, and therefore with a power of alienating from contingent successors.

Property pre-eminently so called, is not unlimited in respect of the power of user.

³⁴ I incline to think that the *power of alienation* from those who would otherwise succeed to the enjoyment, is connected with the idea of *unlimited duration*, not by any necessary sequence, but only through certain caprices of the English law. See Lecture LI. *post*, and notes there.—R. C.

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house to search for stolen goods. If I am the absolute owner of my house, I may destroy it if I will. But I must not destroy it in such a manner as would amount to an injury to any of my neighbours. If, for example, I live in a town, I may not destroy it by fire, or blow it up by gunpowder.

I have a right in my own person which is analogous to the right of property in a determinate thing. And, as a consequence of that right, I may (generally speaking) move from place to place. But this my liberty and right of locomotion, does not empower me to enter the land or house of another, unless I am specially authorised by the owner's license, by a right of way through his house or land, or by some other cause specially empowering me to enter it.

And the power of user which is implied by the right of property, may also be limited by duties which are incumbent on the owner specially and accidentally.

For example: The power of user may be restricted by duties or incapacities which attach upon the owner in consequence of his occupying some *status* or condition. We may conceive, for example, that an infant proprietor is restricted (by reason of his infancy) in respect of the power of using, as well as the power of aliening.

Or the power of user may be restricted by reason of a concurrent right of property residing in another over the same subject. I mean by one which is coupled with a present right of possession, and therefore properly *concurrent*, not *expectant* upon the termination of the other right of property. This is called *condominium*, in the Roman law; joint property and property *in common* in our own.

Or the power of user may be restricted by virtue of a right of servitude residing concurrently over the same subject in another person. For example: I have (speaking generally) a right of excluding others from my own field. But I have not a right of excluding you (exercising your servitude or easement), if you have a right of way (by grant or *præscription*) over the subject of my right of property. I have (speaking generally) a right to the produce of the field: but that right is limited by a right in the parson to a tithe, unless my land be tithe free.

It follows from what has preceded, that neither that right of property which imports the largest power of user, nor any of the rights of property which are modes or modifications of that, can be defined exactly. For property or dominion, *ex vi termini*, is *jus in rem* importing an indefinite power of user: *i.e.* such a

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power of using or of dealing with the subject as is limited by nothing but the duties incumbent on the owner: or a power of applying the subject to any purpose whatever which does not conflict with any duty to which the owner is subject. This indefiniteness is of the very essence of the right; and implies that the right (in so far as concerns the power of user) cannot be determined by exact and positive circumscription. Such an application of the subject as consists with every of his duties, the owner has a right to make: And any act, by another, preventing or hindering any application of the kind, is an offence against his right.

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defined (in respect of the power of user) exactly.

The definition, therefore, of the right of property lies throughout the *corpus juris*, and imports a definition of every right or duty which the *corpus juris* contains.

But though neither absolute property, nor any of its modes, is capable of exact circumscription, the various modes are distinguishable from one another by precise lines of demarcation.

The modes of property are distinguishable from one another by precise lines of demarcation.

For example: The right of owner for life, or of owner for years, may be distinguished from the right of the absolute owner, by an enumeration of the powers of user (belonging to the absolute owner) from which the owner for life or years is excluded.

And this (I apprehend) is the way in which these modes of absolute property are distinguished from absolute property itself and from one another. Such or such a use, for example, which the absolute owner may lawfully derive from the subject, would be in the owner for life or the owner for years, an injury to the remainderman or reversioner.

What I have said with regard to the definition of absolute property quadrates with the practice of law writers or makers of codes.

The definitions (or no definitions) of property, in various codes or systematic treatises.

In the Institutes of Gaius and Justinian, the right of property or dominion is not defined at all. Things are described; the modes of acquiring property in them are described; servitudes are described; but of the right of property or dominion no direct description is given. The nature of the right (in respect of the power of user) left to be inferred from the treatise generally. In the codes or treatises which attempt a definition of it, merely a few of its properties or qualities are given; and those properties or qualities are given with restrictions which lie throughout the body of the law. Thus, in the 544th article of the French Code, property is declared to be the absolute right

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of using or dealing with a thing as we will, provided we do not use it in any manner which is prohibited by laws or *règlements*.

Bentham appears to have seen the same difficulty, and to have got over it in much the same manner. Speaking of *droits intégraux* as opposed to *droits*, he says: 'De tous ces droits, dans un système fondé sur l'utilité, il n'en est aucun qui ne doive avoir des limites. Le premier (droit d'occupation) sera limité par l'obligation de ne faire de la chose aucun usage nuisible à autrui. Le second (droit de donner exclusion à autrui), par l'obligation de permettre l'usage de la chose, à propos de besoin urgent pour l'avantage d'autrui, etc.—Ces exceptions déduites, ce qui reste fait la quantité *intégrale* du droit.'

Blackstone attempts to define property in a personal chattel. The owner, he says, hath solely and exclusively the right and also the occupation of a movable chattel, so that it cannot be taken from him without his act and default. This is evidently so vague, that it amounts to nothing, and must be taken with all the restrictions resulting from the whole body of the law generally. There is no attempt, either by Blackstone or by Sir Matthew Hale, whom he followed, to define an estate in fee-simple, in respect of the power of user.

Such maxims of law as these, *Sic utere tuo ut alienum non lædas*; *Qui jure suo utitur neminem lædit*, and the like, arise from this impossibility of exactly defining and circumscribing the right of ownership or property, and are really almost identical propositions.

The distinction between legal and equitable property (or *dominium ex jure quiritium* and *dominium bonitarium*) is a mere accident, arising from the existence of the accidental distinction between *law* and *equity*, or *jus civile* and *jus prætorium*.⁸⁵

Inquirenda: 1° How to ascertain (if that be possible) the services or uses which *may* be exacted or derived from the subject: 2° How to ascertain the services or uses which *may not* be derived from the subject, out of regard for rights residing in others, or absolute obligations upon self.

The extent of the right in respect of services seems not to be definable; although an enumeration of them may be made co-extensively with (1°) the acts which have been held to be unlawful obstructions or withholdings of such services; (2°) with the acts

⁸⁵ For *dominium ex jure quiritium* vigny's *Recht des Besitzes*, pp. 86, 96, and *dominium bonitarium*, see Hugo's 176. Gaii *Comm.* ii. 40. *Geschichte*, pp. 167, 478, 501, 844. Sa-

which have been held to be a lawful dealing with the subject, or lawful perception of such services.—(See *Blackstone*, vol. iii. p. 120).

The exceptions out of the indefinite services over which (as above) the right extends, consist in such uses of the subject as would amount to violations of a similar or another right in others, or of absolute obligations on one's self. In defining a right, care must therefore be taken not to make it inconsistent with a right intended to be given to another, etc. (Use of interpretation here.)

Property, as here considered, is property existing in its widest extent; unlimited in respect of services, by any right to or over the same subject in another; and limited only by rights of others over or to other subjects, or by absolute obligations on self.

A right limited by rights of others over the same subject (as *dominium* affected by *servitus*; *condominium*, whether in property or *servitus*), though involving fewer services and subject perhaps to fewer violations, is, nevertheless, more difficult to explain.

The attempts to solve these difficulties, which one meets with in ordinary law books, are merely identical propositions and amount to nothing: e.g. '*Qui jure suo utitur neminem lædit.*' If by *lædit* be meant damage or evil, it is false (and inconsistent with what immediately precedes); since the exercise of a right is often accompanied with the infliction of positive evil in another; and where others are excluded from the subject, supposes a pain of privation inflicted on others. If by *lædit* be meant *injury*, the proposition amounts to this; that the exercise of a right cannot amount to a wrong: which is purely identical and tells us nothing; since the thing we want to know is, 'what is right? (or what is that which I may do without wrong?); and what is wrong? (what is that which would not be an exercise of my own right, inasmuch as it would amount to a violation of a right in another?)'

The same observations are applicable to '*sic utere tuo ut alienum non lædas.*'

The definition of those rights which are definite in respect of services, and exist over the same subject, is one means of limiting or defining those rights which are indefinite: Since acts (of user, exclusion, etc.) inconsistent with the former set of rights, are all of them knowable; and are, therefore, so many knowable uses to which the indefinite rights do not extend. But accurately to assign that limit to these last which is presented by the rights of others over other subjects or by the absolute obligations of the owner (where such rights or obligations are themselves indefinite), seems to be impossible; And even if all the rights and obligations which limit were themselves defined, a complete statement of the definition would involve a repetition of the whole code.

Wahres Eigenthum ist nur möglich an körperlichen Sachen. Allein im Römischen Rechte ist der Begriff von Eigenthum auch ausgedehnt auf *jura in re* insofern sie uns als eigene Rechte an einer fremden Sache zustehen: daher, *dominium, ususfructus et servitus*. Im

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weitesten Sinne, begreift Eigenthum *alles was zu unserm Vermögen gehört*, also auch Forderungen.—Mackeldey, *Lehrbuch des heut. Röm. Rechts*, vol. ii. p. 36.

Community of Goods.

Community of goods is nothing but property in common; i.e. a right in the whole over the subject, with a right in each to a certain share in the produce; A right which must depend upon certain conditions; as, e.g. contributing to the product by a due portion of exertion.

Or supposing the right absolute, then the labour must be enforced by punishment.

The necessity of this is derived from two considerations; 1st, that good things can only be procured by labour. 2ndly, that the product of them is limited in amount. At the best, there is not enough for all; i.e. enough to satisfy all the desires of all.

From either of these the necessity of one of the schemes I have mentioned arises.

But even supposing that by training and by the advantages of combination, the labour might be lessened, the amount increased, and the desires limited, this can never be carried so far as to render all law unnecessary.

But the whole is a speculation.

LECTURE XLIX.

SERVITUS, OR EASEMENT.

LECT.
XLIX

IN my last Lecture I considered particularly *property* or *dominion* (as opposed to *servitus* or *easement*). In my present Lecture, I shall consider particularly *servitus* or *easement* (as opposed to *property* or *dominion*).

Recapitulation.

As I stated in my last Lecture, I mean by *property* or *dominion* (taken with the sense wherein I use the term, for the present) any such right *in rem* (of limited or unlimited duration) as gives to the party in whom it resides an indefinite power or liberty of using or dealing with the subject: A power or liberty of using or dealing with the subject which is not capable of exact circumscription or definition; which is merely limited, generally and indefinitely, by the sum of the duties (relative and absolute) incumbent on the owner or proprietor.

As I also stated in my last Lecture, *property* or *dominion* (as thus understood) is susceptible of various *modes*: or (in other words) the indefinite power of user, which is of the essence of all *property*, is susceptible of various degrees of restriction.

But whatever be the extent of the power of user (and of the power of exclusion which the power of user implies), it is not capable of exact circumscription, or of any more exact circumscription than that which I now have indicated.

By *servitus* or *easement* (taken with the sense which I give to the expression) I mean any such right *in rem* (or any such right availing against the world at large) as gives to the party in whom it resides a power of using the subject which is definite as well as limited. The power of using the subject (like that which is imported by the right of property) is limited by the sum of the duties which are incumbent on the party. But, unlike the power of user which is imported by the right of property, it is not *merely* circumscribed by the sum of his duties. The uses which he may derive from the subject, or the purposes to which he may apply it, are defined positively, or are susceptible of positive description.

In short, the difference between property (in any of its modes) and of *servitus* (whatever be its class) would seem to be this:—The party invested with a right of *servitus*, may turn or apply the subject to a *given* purpose or purposes. The party invested with a right of property, may turn or apply the subject to *all* purposes whatsoever, *save* such purposes as are not consistent with any of his duties (relative or absolute).

As I remarked in my last Lecture, it is by reason of his *indefinite* power of user, that the subject of the owner's right is styled *his own*, or *res propria*: that his right is styled *property*, *ownership*, or *dominion*: that he is said to be the *owner* or *proprietor* of the subject, or is styled its *lord* or *master*. For (as I then remarked) there is no mode of property (not even that which is pre-eminently so called), and which implies the largest power of user and exclusion) which gives a power of user completely unlimited, and a consequent power of exclusion which is completely without restrictions.

Before I consider particularly the nature and kinds of servitudes, I must interpose the following brief remarks.

1st. Speaking generally, the subject of a right of servitude is also at the same time the subject of property residing in another or others. For example, if I have a right of way over a field, the field is yours solely, or is yours jointly or in common with others, or is yours for life or years (solely or jointly with others) with rights of property in others expectant on the determination of that your limited interest.

Speaking generally, a right of servitude is a fraction of a right of property residing in another or

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others.
But a right
of servi-
tude may
exist over
a subject
which has
not an
owner pro-
perly so
called.

For this reason,³⁶ rights of servitude are styled by the Roman lawyers *jura in re aliena*: that is to say, rights over subjects of which the property or dominion resides in another or others. Though (as I shall shew at the close of my Lecture) rights of servitude are not the only rights to which the expression *jus in re aliena* (or briefly, *jus in re*) is aptly or actually applied.

For the same reason, a right of servitude is styled by Mr. Bentham a *fractional* right:³⁷ that is to say, a definite right of user, subtracted or broken off from the indefinite right of user which resides in him or them who bear the dominion of the subject. For the same reason, a right of servitude is styled by Savigny³⁸ (in his matchless treatise on the Right of Possession) a single or particular *exception* (accruing to the benefit of the party in whom the right resides) from the power of user and exclusion which resides in the owner of the thing.

Primary
rights, etc.
Rights, *in*
rem, *per se*.

For the same reason, rights of servitude are styled by French writers,³⁹ '*démembrements du droit de propriété*:' that is to say, detached bits or fractions of the indefinite right of user which resides in him or them who own the subject of the servitude. But (as I shall shew at the close of my Lecture) we may conceive a right of servitude existing over a thing, which, speaking with precision, has no owner. We may conceive, for example, that the Sovereign or State reserves to itself a portion of the national territory; but that it grants to one of its subjects, over a portion of the territory so reserved, a right which quadrates exactly with the notion of a right of servitude: that is to say, a right to use or apply the subject in a definite manner.

Now, in the case imagined, there is not, properly speaking, any right of property in the thing which is subjected to the servitude. For, it is only by analogy that we can ascribe to the Sovereign a legal right. Strictly speaking, the party has a right of servitude, while the indefinite power of using the thing has been reserved by the Sovereign or State to itself.

But since most rights of servitude imply rights of ownership, and cannot be explained without reference to those rights of ownership, I shall assume for the present, that every right of servitude is *jus in re aliena*: is a definite fraction, or *démembrement*, of property or dominion in the given subject, which resides in another or others.

³⁶ Savigny, *Recht des Besitzes*, pp. 97, 166. See Table II. Note 4, *post*. Mac-
kelvey, vol. ii. p. 6.

³⁷ *Traité de Législation*, vol. i. p. 251.

³⁸ *Recht des Besitzes*, pp. 525, 534.

³⁹ *Code civil expliqué*, by Rogron,
vol. i. p. 241.

2ndly. I shewed in my last Lecture, that the modes of property (as I understand the expression) are infinite: and that to some of those modes we cannot apply the expression, without a departure from established usage. For example: A right unlimited in respect of user, and also unlimited in respect of duration, is styled property or dominion: and, indeed, is the right to which the name is pre-eminently given. In our own law language, a right indefinite in point of user, though limited in point of duration, is also esteemed and called property, provided the limited duration be not exactly defined. Thus: we should call the right of tenant for life in an immovable thing, *property*, or a *right of property*. But a right indefinite in point of user, is not, in our own law language, styled *property*, in case the right be of limited duration, and the duration be exactly defined. Thus: The right of tenant for years, under a lease of a house or farm, is not called property, although his right is *jus in rem*, and gives him an indefinite power of using or dealing with the subject. We should say of a life interest in an immovable, or a personal chattel, that the party has an estate (or a right of *property*) with remainder or reversion over to another or others. We should also say of the interest of a lessee for years, that he has an *estate* for years, with reversion over to another.

But we should not style his interest *property* or *ownership*, although his power of user were not more limited than that of a tenant for life, and though the duration of his interest were incomparably longer than that of tenant for his own or for the life of another. [Perhaps the interest of tenant for years (like that of the Roman *conductor*,⁴⁰ etc.) was not originally *jus in rem*, but merely gave him a right to the enjoyment against the lessor.]

Various other difficulties, which encumber the term 'property,' I stated in the Lecture before the last.—I will merely add, at present, that I mean by the term property (as contra-

⁴⁰ The analogy is remarkable. By the *jus civile* the *conductor* could only protect his right by a *personalis actio* against his lessor. But the legislation of the Prætors extended to him, for his interest, the benefit of the various *Interdicts*, and thus gave him what was called a *quasi in rem actio*. The extension by the Prætor of these remedies in favour of the *conductor* was precisely equivalent to the introduction of the rule by which our Courts of Common Law gave the lessee, who had been ousted from

possession, specific restitution to his *term in the land*. The first instance occurred in the reign of Edward IV., and the *quasi in rem actio* thus given to the lessee, as it availed against all who could not shew a better title than his lessor, became convenient for trying questions of right, and is the original of the modern ejectment. See Blackstone, vol. iii. p. 200. Cf. Vat. Frag. 44, and Dig. xliiii. 18 (De Superficiebus), l. i. § 1, and the preceding title (Uti possidetis).—R. C.

distinguished to *servitus*) any right in *rem* (of any duration whatever) which gives to the entitled party an indefinite power of user. For I am not considering rights with reference to their various durations, but with reference to the power of user which they variously import. Though (as I shewed in my last Lecture) the power of user (in cases of property) is so modified by the extent of duration, that it is impossible to consider rights of property from the former of the two aspects, without considering them, to some degree, from the latter also.

The term *servitus* is not less encumbered with difficulties than the term *property*. For there are many rights (as I shall shew presently) which, in the language of the Roman law and of the modern systems derived from it, are styled *servitudes*: but which, in the language of the English, would be styled *rights of property*. And, justly: for they are rights importing an indefinite power of user, although they are not rights of unlimited duration; and although they do not empower the party to alien the subject from those who *would* succeed to him in default of such alienation.

To these improper *servitudes* I shall advert more fully hereafter. And I now merely add, that I mean, for the present, by a *right of servitude* (as opposed to a *right of property*) any such right in a subject owned by another or others as gives to the party a *definite* power of using it.

The term *easement* is not less objectionable than the term *servitus*. For though it is never extended to any such rights in *rem* as fall properly within the category of *property*, it is *not applied* to certain rights in *rem* which fall properly within the category of *servitudes*. For example: A right of way over another's field is styled an *easement*. A right of common is also styled an *easement*. But a right to predial tithes (or to a definite portion in the produce of another's land) is never (I think) styled an *easement*: although it is called a *servitude* (or by a name of similar import) in the language of the legal systems which have borrowed largely from the Roman.

But whatever may be the usual import of the term *easement* (and it has not, I think, any settled import), I venture to use it with the sense in which I employ the term *servitude*; as meaning any right (definite in point of user) over a subject which is *res aliena*.

Quære,
Whether a
negative
servitude

3rdly. For the sake of simplicity, I have assumed in my Outline, and also in my last and present Lectures, that every right of servitude is a right of *using* a subject owned by another

or others. But, as I shall shew immediately, there are certain servitudes, which, in the language of modern Civilians, are called *negative*: and which in the language of the Roman lawyers, are said to consist *non faciendo*; that is to say, not to consist of a right to *use positively* the given subject, but in a right to a *forbearance* (on the part of the owner) from putting the given subject to a given use.

Now, whether a negative servitude be really a right of user, or whether it be a servitude at all (and be not rather a mere right *in personam*), are questions which, I frankly confess, I have not been able to solve to my own satisfaction—I shall, however, discuss the subject immediately: And I merely advert to it, in this preliminary manner, in order that I may prepare you for a discrepancy between the definition of a servitude which I have hitherto given, and that analysis of servitudes to which I now proceed.

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be a right of using the subject? And whether it be not merely *jus in personam* against the owner or occupant?

Attempting to analyse the nature of servitudes, and to mark the chief kinds into which they are divisible, I shall address myself to the following principal (and to various subordinate) topics.

1st. The distinction between the servitudes which are styled by modern Civilians *affirmative* or *positive*, and the servitudes which are styled by the same Civilians *negative*; that is to say, those which consist in a right to *use* in a given manner the given subject, and those which consist in a right to a *forbearance* (on the part of the owner) from putting the given subject to a given use.

2ndly. I shall then examine the celebrated position, that no right of servitude is a right to an *act* on the part of the owner: that every right of servitude is a right to *use* the subject or a right to a *forbearance* (on the part of the owner) from using the subject.

3rdly. I shall examine the distinction between *real* servitudes and *personal* servitudes: or (adopting to a certain extent the language of the English law) between servitudes *appurtenant* and servitudes *in gross*.

4thly. I shall examine the rights of property or dominion (meaning by *property* or *dominion* any right *in rem* importing an indefinite power of user) which, in the Roman Law, are ranked improperly (as I conceive) with rights of servitude.—It is of no small importance, that this confusion of disparate objects should be pointed out and cleared up. Without such a previous explanation, a great portion of the Roman Law, and of the modern systems which have borrowed its terms and classifications, are

Order wherein the nature and kinds of servitudes will be considered.

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to an English lawyer inexpressibly perplexing. *Ususfructus, usus, habitatio, superficies, emphyteusis*, and, perhaps, other rights, which, in the language of the Roman Law are frequently styled *servitudes*, would be deemed (and I think justly) by English lawyers, rights of property for the life of the owner, or rights of property nearly approaching (in principle) to an estate in fee-simple or absolute property in a personal chattel.

In pursuance of the order which I have now indicated, I begin with the established division of rights of servitude into *positive* or *affirmative* servitudes, and *negative* servitudes.

Distinction between affirmative or positive, and negative servitudes.

As I remarked in my last Lecture, the right of property or dominion (in so far as the right of user is concerned) is resolvable into two elements : 1st, the power of using indefinitely the subject of the right, or of applying the subject of the right to uses or purposes which are not positively and exactly circumscribed : 2ndly, a power of excluding others (a power which is also indefinite) from using the same subject. For a power of indefinite user would be utterly nugatory, unless it were coupled with a corresponding power of excluding others generally from any participation in the use.

The power of user and the power of exclusion are equally rights to *forbearances* on the part of other persons generally. By virtue of the right or power of indefinitely using the subject, other persons generally are bound to forbear from disturbing the owner in acts of user. By virtue of the right or power of excluding other persons generally, other persons generally are bound to forbear from using or meddling with the subject. The rights of user and exclusion are so blended, that an offence against the one is commonly an offence against the other. I can hardly prevent you from ploughing your field, or from raising a building upon it, without committing, at the same time, a trespass. And an attempt on my part to use the subject (as an attempt, for example, to fish in your pond) is an interference with your right of user as well as with your right of exclusion. But an offence against one of these rights is not of necessity an offence against the other. If, for example, I walk across your field, in order to shorten my way to a given point, I may not in the least injure you in respect of your right of user, although I violate your right of exclusion. Violations of the right of exclusion (when perfectly harmless in themselves) are treated as injuries or offences by reason of their probable effect on the rights of user and exclusion. A harmless violation of the right of exclusion, if it passed with perfect impunity, might lead, by the force of example, to such

numerous violations of the right as would render both rights nearly nugatory.

The rights of user and exclusion (let them be never so extensive) are never absolute or complete; that is to say, they are always restricted (more or less) by rights residing in others and by duties incumbent on the owner. They are always restricted generally by the rights of others generally, and by the duties to which the proprietor is generally subject. Frequently, they are restricted by rights over the same subject, residing specially in determinate parties: as by the rights of a joint or co-proprietor, or by the rights of a remainderman, or reversioner, having also a right of property in the subject.

Where a determinate party has a right (as against the owner and the rest of the world) to put the thing to uses of a definite class, the party has a right over the thing, which is commonly called a *servitude*. Where a determinate party has a right (as against the owner and the rest of the world) to a forbearance (on the part of the owner) from putting the thing to uses of a definite class, that party has also a right over the thing which also is styled a *servitude*.

It is necessary (I apprehend) in order to the existence of a servitude, that the right of the party should be *jus in rem*, or a right against the world at large. If it merely availed against the owner (or against the other occupant for the time being) it would come under the predicament of *jus in personam*. And it is for this reason (as I shall shew immediately) that no right of servitude is a right to an act. For if it were a right to an *act*, to be done by the owner (or other occupant), it would merely avail against that determinate party, and would be a right arising from a contract, or from a *quasi*-contract.

Every servitude is *jus in rem*.

It is also necessary (I apprehend) in order to the existence of a servitude, that the party should have a right (of limited or unlimited duration) to put the subject generally to uses of a definite class: or to a forbearance generally (on the part of the owner) from putting the subject to uses of a definite class. For example, if I have a right (for life or years) of passing at all hours over your field, or of passing at certain hours over your field, I have a right of way: an easement or servitude. For I have a right of putting your field generally to uses of a definite description. But if you give me leave to shoot over your farm, once, twice, or any other definite number of times, my right derived from the license would hardly (I think) be deemed an easement. It would merely be a right against you, and perhaps against other

A servitude is not a right to *specifically* determined uses, or to *specifically* determined forbearances on the part of owner or other occupant.

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persons generally (derived from your particular license), to derive from your farm certain uses determined individually as well as by class or description.

Positive or affirmative servitudes (*quæ in patiêdo consistunt*), and negative servitudes (*quæ in non faciêdo consistunt*).

As I said in my last Lecture, where the party entitled to the servitude has a right to *use* the subject, his right is styled, by modern Civilians, 'a positive or affirmative servitude.' Where he has a right to a *forbearance* (on the part of the owner or occupant) from using the subject, the right is styled by the same Civilians, a *negative* servitude.

By the Roman Lawyers, a positive servitude (in respect of the owner) is said to consist in *patiendo* : *i.e.* in his duty to forbear from molesting the other in the given user of the subject. A negative servitude (in respect of the owner) is said to consist in *non faciêdo* : *i.e.* in his duty to forbear from using the subject in the given manner or mode. In either case, the right (it is manifest) is a right to a *forbearance* on the part of the owner ; a forbearance from molesting the other in the given use, or a forbearance from using in a given mode.

As against the owner (or other occupant), *every* right of servitude is therefore *negative* : *i.e.* does not impose upon him a duty to do or perform. In respect of the party entitled to the servitude, a so-called positive or affirmative servitude is, in a certain sense, positive as well as negative ; *i.e.* it gives him a right to do acts over the given subject, as well as a right to a forbearance on the part of the owner or occupant from molesting him in the performance of those acts. But a negative service is *merely* negative : *i.e.* it merely gives him a right to a forbearance on the part of the owner.

A so-called negative servitude merely restricts the owner's right of user ; that is to say, by reason of the existence of the servitude the owner has not a right to turn the subject to some use implied generally in his right of property, and to which but for the servitude he would be at liberty to apply it.—A so-called positive servitude restricts his right of exclusion *and* his right of user. If I have a right to deal in a given manner with the subject, for example, to pass over it by a right of way, my right sets a limit to his power of exclusion, and hence to his power of user ; for he cannot turn the subject to any purpose which would impede my right of user : as by ploughing it up, or erecting an obstruction across the way.

Cases of positive servitudes are rights of way or of common. These are rights of dealing positively with the subject ; of putting

the subject to certain positive uses. Cases of negative servitude are the *servitus altius non tollendi*, and the *servitus ne luminibus* and *ne prospectui officiat*. Generally speaking, the owner has a right of building on any part of his own land; *cujus est solum ejus est usque ad cælum*. But, by a right of servitude residing in another person, I may be prevented from building so as to prevent his looking over my land from his house; I may be prevented from building so as to obstruct his *ancient lights*, or to prevent him from a look out which he had acquired by a special title. Another example is the *servitus stillicidii recipiendi*; a right to compel your neighbour to receive the water which drops from your roof. An analogous right which often leads to contest in cities, the right of compelling your neighbour to receive through his house the drainage running from your own, would also be deemed a negative servitude. It is not a right of putting his land or house to any positive use, but a right to prevent him from dealing with his land or house in certain ways, in which but for your right, he would be at liberty to deal with it.

I have gone on stating this distinction, because it is found in the Roman law and other legal systems; but I doubt whether there is anything in it. It seems to turn on the extent you give to the word *user*. In a right of way or of common you are said to *use* the thing which is the subject of your right of servitude. But in case of a duty to receive the drainage from your house, you may also be said with propriety to put the subject to certain uses. Whether this would apply to the case of a right to a look out, it is more difficult to decide; and I am inclined to think that this single case suggested the distinction.

Doubtful whether there is any scientific foundation for this distinction.

When I have a right not to have my ancient windows blocked up, it is not necessary that I should do anything for the existence of my right; it is a right only to a forbearance.

In the servitudes which are deemed negative, it is generally necessary that I should do something. If the drain wants repairing, and the water will not flow, it is incumbent on me to repair the drain; or if it is incumbent on the owner to do so, it devolves on him by some special *titulus*, totally distinct from the *servitus* itself. I doubt, therefore, if the distinction of which so much is said in the books, has any meaning at all.

No right of servitude can consist *in faciendo*; ⁴¹ i.e. can consist in a right to an *act* or *acts* on the part of the owner or other occupant. This follows from the very nature of a servitude, to which it is essential that it should be *jus in rem*, or a right avail-

No right of servitude can consist in *faciendo*.

⁴¹ Mackeldey, vol. ii. pp. 78, 88. Thibaut, *Versuche*, vol. i. p. 27.

ing against persons generally; for if it consisted in a right to an *act* to be done by the owner or other occupant, it were merely *jus in personam* against that determinate party.

In the case of a servitude, the *jus in rem* may happen to be combined with *jus in personam* against the owner: and so, may happen to be combined with a right to an *act*, against the owner: *e.g.* a right to have a way repaired by the owner.

Quære, Whether every *servitus* be not *jus in personam* against the owner or other occupant, and *jus in rem* against the rest of the world?⁴²

Quære, Whether a negative servitude be *jus in rem*?

Whether a
negative
servitude
be *jus in
rem*?

An affirmative servitude may clearly avail against *any*, and may be violated by *any*. *E.g.* A stranger to the soil may violate a right of common, by putting his cattle on the commonable land?⁴³ And in the case of a negative servitude, it is possible for a stranger (*e.g.* a trespasser) to *do* the act which would prevent the enjoyment of the servitude: *e.g.* to build up, or otherwise obstruct, ancient lights. In the case, however, of a negative servitude, it is less likely that a stranger should disturb; because the disturbance would not be an act of user.

I apprehend that a negative servitude is usually brought within the category of *jura in rem* thus: it avails *adversus quemcumque possessorem*; *i.e.* with or without title from the actual or preceding owner. Now as against an occupant without title, it could not be the result of a contract; for he is not privy to any contract of the present or any preceding owner. Still, however, it might arise from a quasi-contract: *i.e.* from the mere fact of his occupancy. It would seem that a duty to *do* (which must correlate with *jus in personam*) may attach upon the occupant by prescription.⁴⁴

Though the occupancy, without title from the owner, may be an injury against the owner, it may not be *per se* an injury against the party having the right of servitude. Consequently, though the adverse possession might be wrongful (and therefore could not be a quasi-contract) in regard to the owner, it might be a quasi-contract in regard to the party having the right of servitude.

An affirmative as well as a negative servitude avails *directly*

⁴² Blackstone, vol. ii. p. 36 (Note 15).
See Table II. Note 3, B, a b, *post*

⁴⁴ *Ibid.* vol. ii. p. 36 (Note 15). See
Notes 1 and 2, p. 46, *ante*.

⁴³ *Ibid.* vol. iii. p. 237.

against the owner or other occupant of the subject. For an affirmative, as well as a negative servitude is a definite exception (accruing to the party having the servitude) from the indefinite powers of user and exclusion which the property in the subject comprises. Consequently, an affirmative as well as a negative servitude (considered exclusively with relation to the owner or occupant) might be deemed *jus in personam*. But since a right of servitude, positive or negative, may be violated by third parties, it implies a duty to forbear from disturbing, which lies upon third parties generally as well as on the owner or other occupant of the thing, and therefore is *jus in rem*. And such disturbance by third parties would not affect the right consequently through a violation of right residing in another.

If, therefore, a negative servitude be *jus in rem*, it is so, because by possibility any may violate it, though none but the owner or occupant is likely to do so.

The distinction between an occupant without title, and a mere trespasser or other stranger is, that the former is exercising over the subject a right of property residing in another; while the latter does not affect to exercise any such right. To explain this, we must analyse the right of possession.

The subject of the servitude is said itself to serve: *res servit*; which merely means, that the right of servitude avails (with or without limit in respect of duration) against every person whatever who has a right of property in the subject, or who, as adverse possessor, may exercise any right of property over it.⁴⁵

If the servitude be properly so called, it also avails against the rest of the world, or is *jus in rem*.

If it be a servitude improperly so called, it is merely *jus in personam*, *ex contractu*, or *quasi ex contractu*, against every proprietor of the subject, or against any adverse possessor exercising rights of property over it.

If it consists *in faciendo* (or in a duty on the owner or occupant to *do* or *perform*) it is necessarily in this plight. And it may be in this plight, although it consist *in patiendo* or *in non faciendo*: i.e. in a duty on the owner or occupant, not to hinder the given use, or not to use in the given mode. At least, the right to the forbearance may be, as against the owner or occupant, *jus in personam*, although it avail (at the same time) against the owner or occupant together with the rest of

⁴⁵ Mackelvey, vol. ii. pp. 75, 76.

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the world. (E.g. In case of a covenant added to a grant or præscription.)

I must here notice an absurd remark of Rogron. He says :

‘Les principes généraux des servitudes s’appliquent à l’usufruit, à l’usage, et à l’habitation ; et surtout ce principe fondamental, que c’est la chose qui doit les services, et non la personne. *Prædium non persona servit.* D’où on conclut que le propriétaire est tenu de souffrir, et de laisser faire, et jamais de faire ; car le fonds seul étant obligé, il ne peut l’être que passivement.’⁴⁶

The true reason why a servitude cannot consist in *faciendo* is, that, if it did, it could not be *jus in rem*. A duty to do (when not an *absolute* duty, or when corresponding to a *right*) being of a necessity an *obligatio*, or a duty lying exclusively on a specifically determined party or parties.

*Nulli res
sua servit.*

Inasmuch as every servitude is a definite subtraction or exception (accruing to the party having the right of servitude) from the indefinite rights of user or exclusion which reside in the proprietor of the thing, it follows that no man has a right of servitude in a thing of which he is the owner: *Nulli res sua servit.* For if he had, he would have a right in the thing against himself: which is absurd. Consequently, if the party having a right of servitude acquire the property of the thing, the right of servitude is lost in the more extensive right, or at least is suspended, so long as his right of property resides in himself.

‘*Servitus*’
means the
onus, or the
*jus in re.*⁴⁷

The term ‘*Servitus*’ has two meanings. It means, originally, the metaphorical servitude or duty of the thing: i.e. the duty really incumbent on any proprietor of the thing, or on any occupant of the thing exercising rights of property over it. But it means also the *jus servitutis*, or the right which corresponds to that duty: the *jus in re aliend.*

A right of
servitude
may co-
exist with
any mode
of pro-
perty, etc.

It is clear that a right of servitude (of any extent in respect of duration) may co-exist with any mode of property in the same subject, or with the right of an adverse possessor exercising rights of property over it. Whether the thing be in lease or subject to property for life, or owned jointly or in common, or owned severally, or subject to any number of modes of property at one and the same time, the right of the party entitled to the servitude avails equally.

For his right is a subtraction from the property of the thing, let that property be divided as it may, or let it be exercised

⁴⁶ Rogron, *Code civil expliqué*, vol. i. livre ii. titre 3.

⁴⁷ Mackelvey, vol. ii. p. 76.

with a perfect title, or only by virtue of a possession acquired adversely.

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In short, the right of servitude is a subtraction from the right of property (considered in respect of the powers of user and exclusion which the right of property naturally imports). And it therefore may be concurrent with any right of property in the same subject (be its duration and title what they may).

And as a servitude is a *definite* subtraction from the right of property, it would seem that the extent of the user has no dependence on the extent of the duration.

Aliter in cases of property.

A servitude must arise from a peculiar relation with the party in whom the correlating right resides, and must not be imposed with reference to the interests of persons generally. There are certain duties incumbent on proprietors which are confounded with servitudes, but which are not properly such. *E.g.* Duty not to let my house (being situate in a town) go to ruin so as to endanger persons passing in the street (an absolute negative duty). Duty to keep a certain public road in repair (an absolute positive duty).

Absolute duties (positive or negative) annexed to property are not servitudes.

LECTURE L.

REAL AND PERSONAL SERVITUDES.

IN pursuance of the order wherein, in my last Lecture, I proposed considering the nature and the chief kinds of servitudes, I now proceed from the distinction between positive and negative servitudes, to the distinction between *personal* and *real* servitudes.

LECT. L

A *real* servitude (or a *real* right of servitude) resides in the party having the servitude, as being the owner or other occupant of a determinate parcel of land: or as being the owner or other occupant of a determinate building with the land whereon it is erected. And it is a right, against every owner or occupant of *another* parcel of land or building, to a power of using the latter in some definite mode, or to a forbearance (on the part of the owner or occupant of the latter) from using the latter in some definite mode. As I shall remark immediately, it hardly

Distinction between *real* and *personal* servitudes.⁴⁰

⁴⁰ Mackeldey, vol. ii. pp. 79, 80, 86. Table II. Note 5, § 4, *post*.

LECT. L could be a right against the owner or occupant of a movable thing.

A real servitude, therefore, supposes the existence of two distinct parcels of land to each of which it relates. For it is a right in a given person, as being the owner or occupant of a determinate parcel of land, against another given person, as being the owner or occupant of another determinate parcel of land. I use the term land as including land merely, or as including land with a building erected upon it. And hence it follows, that a real right of servitude is said to be annexed to the parcel of land the owner or occupant whereof hath the right of servitude. Or, in the language of the English law, it is said to be *appurtenant* to the land or messuage the owner or occupier whereof hath the right of easement. The meaning of which expressions is merely this: that the right resides in the owner or occupant, as being such owner or occupant, and passes successively to every such owner or occupant for the time being, from every owner or occupant immediately foregoing.

And hence it also follows, that a real servitude (as meaning the *onus* or duty, and not the *jus servitutis*) is said to be imposed upon one of the two parcels of land for the use or advantage of the other: or that the servitude (as meaning the *onus* or duty, and not the *jus servitutis*) is said to be due to one of the two parcels of land from the other. That is to say, the duty is imposed upon every owner or occupant of the one (as being such owner or occupant) for the use or advantage of every owner or occupant of the other (as being such owner or occupant). Or the duty is due from every owner or occupant of the one (as being such owner or occupant) to every owner or occupant of the other (as being such owner or occupant).

And hence we may derive the origin of the metaphorical expressions by which, in the language of the Roman law, the two parcels of land (or the two *prædia*) are contradistinguished.

I have remarked above, that, in every case of a right of servitude, the thing which is the subject of the right, and not the owner or other possessor of the thing, is said to be burthened with the servitude (considered as an *onus* or duty): '*res servit*;' or '*res, non persona, servit*.' Meaning, that the right of servitude avails against every person whomsoever, who may happen, for the time being, to have property in the thing, or, as adverse possessor, to exercise a right of dominion over it.

And, in the case of a *real* servitude, the parcel of land, the owner or occupier whereof hath the right of servitude, is said

to *dominate* over the land, from the owner or occupier whereof the corresponding duty is owed. The former parcel of land is styled *prædium dominans*; the latter parcel of land is styled *prædium serviens*: being merely a case of the more general metaphor, by which any thing, happening to be the subject of any servitude, is said to be in a state of servitude.

The only difference, in this respect, between real and personal servitudes, consists herein: that in the case of a personal servitude (or a servitude due to a person *not* as being the owner or occupant of a given parcel of land), the thing, which is the subject of the servitude, is said to serve the person in whom the *jus servitutis* resides. But in the case of a *real* servitude, it is said to serve, not the owner or occupant of the related and opposed subject, but the subject itself.

The import of the related terms '*prædium dominans*' and '*prædium serviens*,' I have explained in another place, with more clearness and conciseness than in the hurry of preparing a lecture I can often attain to. As the passage is very short, I will now read it.

The servitudes of the Roman Law are of two kinds: 1°. Prædial or *real* servitudes ('servitutes prædiorum sive rerum'); 2°. *Personal* servitudes ('servitutes personarum sive hominum').

Now '*real*' and '*personal*,' as distinguishing the kinds of servitudes, must not be confounded with '*real*' and '*personal*,' as synonymous or equivalent expressions for '*in rem*' and '*in personam*.' In a certain sense, all servitudes are *real*. For all servitudes are rights *in rem*, and belong to that *genus* of rights *in rem* which subsist *in re aliend*.

And, in a certain sense, all servitudes are *personal*. For servitudes, like other rights, reside in *persons*, or are enjoyed or exercised by *persons*.

The distinction between '*real*' and '*personal*,' as applied and restricted to servitudes, is this: A *real* servitude resides in a given person, as the owner or occupier, for the time being, of a given *prædium*: *i.e.* a given field, or other parcel of land; or a given building, with the land whereon it is erected. A *personal* servitude resides in a given person; without respect to the ownership or occupation of a *prædium*. To borrow the technical language of the English Law, *real* servitudes are *appurtenant to lands or messuages*: *personal* servitudes are servitudes *in gross*, or are annexed to the persons of the parties in whom they reside. Every *real* servitude (like every imaginable right) resides in a

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person or *persons*. But since it resides in the person as occupier of the given *prædium*, and devolves upon every person who successively occupies the same, the right is ascribed (by a natural and convenient *ellipsis*) to the *prædium* itself. Vesting in every person who happens to occupy the *prædium*, and vesting in every occupier *as* the occupier thereof, the right is spoken of as if it resided in the *prædium*, and as if it existed for the advantage of that senseless, or inanimate subject. The *prædium* is erected into a legal or fictitious *person*, and is styled '*prædium dominans*.' On the other hand, the *prædium* against whose occupiers the right is enjoyed or exercised, is spoken of (by a like *ellipsis*) as if it were subject to a duty. The duty attaching upon the successive *occupiers* of the *prædium*, is ascribed to the *prædium* itself; which, like the related *prædium*, is erected into a *person*, and contradistinguished from the other by the name of '*prædium serviens*.' Hence the use of the expressions '*real*' and '*personal*,' for the purpose of distinguishing servitudes.

The rights of servitude which are inseparable from the occupation of *prædia*, are said to reside in those given or determinate *things*, and not in the physical persons who successively occupy or enjoy them. And, by virtue of this *ellipsis* and of the fiction which grows out of it, servitudes of the kind are styled '*servitutes rerum*' or '*servitutes reales*;' *i.e.* rights of servitude annexed or belonging to *things*.

The rights of servitude which are not conjoined with such occupation, cannot be spoken of as if they resided in *things*. And since it is necessary to distinguish them from real or prædial servitudes, they are styled '*servitutes personarum*' or '*servitutes personales*:' *i.e.* rights of servitude annexed or belonging to persons. See Table II. Note 5, Section 4, *post*.

A personal servitude (or a personal *right* of servitude) resides in a given or determinate person, *not* as being the owner or occupier of a given parcel of land.

The expression '*personal*' (as here used) is, like a multitude of other expressions wearing a positive form, a merely negative term. It means that the servitude to which it is applied, is *not* a real servitude (in the sense which I have just explained): that it does *not* reside in the party entitled to it, as being the owner or occupier of a given or determinate thing *other* than the determinate thing over which the right exists. For (it is manifest) every servitude (personal or real) is, in some senses of the term '*personal*,' a personal servitude: *i.e.* it resides, as a right, in a

person, and is due, as a duty, from a *person*: although it may reside in the party entitled as standing in a given relation to a given thing, or as considered without relation to a given thing.

And (as is equally manifest) every servitude, personal or real, is, in some senses of the term 'real,' a real servitude. For, whether it reside in the party entitled, as being related to a given thing, or it reside in the party entitled independently of such relation, it is a right over a *thing* of which the burthened party is the owner or possessor, or (what is the same in effect) over a person (occupying a position analogous to that of a thing) of whom the burthened party is owner or possessor. (*E.g.*: We may conceive that the subject of the servitude is a *slave* of which the burthened party is either *dominus* or adverse possessor.) And whatever may be the character wherein the party having the servitude hath the same, his right of servitude is also *real*, as being *jus in rem*: for, as I have shewn in former Lectures and also elsewhere, the real and personal rights of the modern Civilians (as well as their *jura in re* and *jura ad rem*) are, in their largest meanings, equivalent to the *jura in rem* and *jura in personam* of the same Civilians, and to the *dominia* and *obligationes* of the Roman lawyers themselves.—Unless a servitude be *real* as meaning *jus in rem*, it is not a servitude properly so called: but it is merely a right availing exclusively against a determinate person or persons, and arising *ex contractu* or *quasi ex contractu*.

This negative import of *personal*, as applied to a servitude, ought to be marked particularly. For, in consequence of writers not having noted or remembered it, they have frequently missed the essence of the distinction between real and personal servitudes, and have regarded mere accidents as being essential to it.

For example: We are told by M. Rogron⁴⁹ (the annotator on the French Code whom I have already mentioned) that a real servitude is *real*, because it is due not to a person, but to a thing: M. Rogron meaning thereby (if, indeed, we can impute a meaning to him) that it is due to a *person* as being related to a *thing* by his ownership or adverse possession thereof. And he tells us, conversely, that a personal servitude is a *personal* servitude, because it is due, not to a thing, but to a person: He meaning thereby (in so far as meaning he hath), that it is due to a person, independently of his ownership or adverse possession of any determinate thing.

And, in like manner, a right of common *in gross* (which is

⁴⁹ Code civil expliqué, vol. i. p. 241.

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of a species of personal servitudes) is said, in the language of the English law, 'to be annexed to the *person* of the party in whom it resides:' an expression which obscures and perplexes the true nature of the right; inasmuch as any right whatever, not less than any other right whatever, is annexed to, or inheres in, the person of the party entitled. The English lawyers, however, unlike M. Rogron, do not mistake the import of the distinction, although they use expressions which tend to obscure it. For, in the same breath, wherein they tell us that a right of common in gross is annexed to the party's person, they tell us that it is *such* a right of common as is *not* appurtenant to a land or messuage,⁵⁰ thus hitting off accurately the negative character which distinguishes a personal from a real servitude.

Again: we are told by modern expositors of the Roman Law, that a personal servitude is created for the advantage of the given *person* in whom it resides, is inseparable from his *person*, and necessarily ceases at his death:⁵¹ In other words, that a personal servitude is necessarily an interest for the life only of the party entitled, and is by the party unalienable.

But, first: A personal servitude, though no more than a life interest, if the extent of the interest be not declared at the creation, may be given, by express words, to the party and his heirs. And, admitting that the Roman Law determined otherwise, the limitation of the interest to the life of the party, were merely an accidental consequence of an accidental provision of the Roman Law. For what is there in the essence of a personal servitude, that necessarily limits its duration to the life of the party?

With regard to its alleged unalienability, it was not alienable completely: that is to say, the party might cut out of it, and pass to another, any interest of limited duration short of his whole estate. But he could not so alien it, as not to leave a reversion in himself, and as to cast on the alienee the whole right of servitude.

But admitting that it was unalienable, its unalienability was a mere accident, and not a property inseparable from its very nature. There is no reason why a right of common in gross should not be just as alienable as any right of property in the same subject.

The modern expositors of the Roman Law have, therefore, characterised a personal servitude, not by its true essence, but by certain of its mere accidents: misstating, by the bye be it mentioned, those very accidents.

⁵⁰ Blackstone, vol. ii. p. 33.

⁵¹ Mackeldey, vol. ii. pp. 79, 80.

And they probably were led into this error, by their not remarking that merely negative meaning of the epithet *personal* to which I have adverted. Seeing that the servitude is styled *personal*, they supposed that it must have some special connection with the person of the party: that it was, in its very nature, inseparable from his person, or inseparably connected with his person: that it therefore expired necessarily with his person, or could not endure beyond his life, and was also unalienable to any other party.⁵²

It is remarkable that unalienability (which they suppose to be of the essence of a *personal* servitude) is truly, in a certain sense, of the essence of a *real*. For since it is annexed to a given *prædium* (or resides exclusively in the owners or occupiers thereof), it cannot be aliened or detached from the *prædium* itself or cannot be aliened without the *prædium*), without changing it from a *real* to a *personal* servitude. Insomuch that a necessary property of *real* servitudes has been mistaken for a characteristic mark of servitudes of the opposed class.

[*v. v. Semble*, that a real servitude can hardly exist over a movable. (Suggest reason.)

In fact and practice, all the real servitudes of the Roman Law are servitudes over immovables. It is essential to the being of a real servitude that there should be a '*prædium serviens*,' and a '*prædium dominans*.'

v. v. Semble, that a personal servitude, if a genuine servitude, and not one of the modes of property improperly called servitudes, can hardly exist over a movable. (State reason.)]

The division of servitudes into affirmative and negative and into real and personal, are manifestly cross divisions. A right of way and a right of common are both of them affirmative servitudes, being rights to use or deal positively with the subject: and they may be either *appurtenant* or *in gross*; that is, either real or personal.

Negative servitudes, perhaps, are nearly universally real. They generally avail only to the advantage of the owner or occupant of the one *prædium*, as being such owner or occupant, against the owner or occupant of an adjoining *prædium*.

There is a distinction of real servitudes into *servitudes prædiorum urbanorum*, and *servitudes prædiorum rusticorum*. But as the distinction is peculiar to the Roman Law, and has no scientific precision, I pass it over as not belonging to my Course. I merely mention it for the sake of the terms.

⁵² Mackeldey, vol. ii. p. 88.

LEOT. L

An urban servitude has no necessary connection with a city or town. A rustic servitude has no necessary connection with the country.

An urban servitude is a real servitude appurtenant to a building (including the land whereon it is erected). A rustic servitude is a real servitude appurtenant to land (without reference to any building that may happen to be erected upon it).

The principal scope of an urban servitude, is, speaking generally, the commodious enjoyment of a dwelling-house to which it is annexed. The principal scope of a rustic servitude, is, speaking generally, the commodious cultivation of a parcel of land to which the servitude is appurtenant. Consequently, urban servitudes occur most frequently in a city or town: rustic servitudes occur most frequently in the country. And hence the respective names of the two classes of servitudes: Though an urban servitude may be annexed to a building situate in the country, as a rustic servitude may be appurtenant to land within the boundary of a city or town.

Examples: A right to a forbearance from an obstruction to one's ancient lights, is an urban servitude: *i.e.* annexed to a building: A right to pasture one's oxen on land belonging to another, is, speaking generally, a rustic servitude: *i.e.* annexed to a farm, and not to any of the farm buildings.

By modern Civilians, and in the language of the modern systems of law which are mainly formed on the Roman, real and personal servitudes are marked and distinguished by those epithets.⁵⁸ In the language of the Roman lawyers, they are also marked and distinguished by those epithets, but are more commonly called *servitutes prædiorum sive rerum*, and *servitutes personarum sive hominum*. It is worthy of remark, that real servitudes, in the language of the Roman lawyers, are frequently styled *servitutes* simply: or that the name *servitutes* is frequently restricted to real servitudes, whilst personal servitudes pass under the generic name of *jura in re alièna*: which, as I shall shew hereafter, comprises many rights not esteemed servitudes, and others which though sometimes included among servitudes, are improperly so included.

In the language also of the French Code, the term '*servitude*' is limited exclusively to real or prædial servitudes, or *services fonciers*: personal servitudes not being marked by any common epithet, but being designated exclusively by the names

⁵⁸ Rogron, vol. i. p. 263.

of their several species: As '*usufruit, usage, habitation,*' and so on.⁵⁴

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In the English Law, we have no adequate names to mark the distinction between real and personal servitudes, any more than we have an adequate name for servitudes. The names approaching to the Roman, would be, easements appendant and appurtenant, and easements in gross.

Having explained these two classes of servitudes in general terms, I shall advert to some examples of each kind.

Examples of real and personal servitudes.

A right of way *appurtenant* is an obvious example of a real servitude; and a right of way *in gross*, of a personal servitude.

Common appendant and appurtenant, as opposed to common *in gross*, are an equally familiar example of a real servitude. I advert to it in order to observe that what is called *appendance* (if I may be permitted to coin an abstract name corresponding to the concrete *appendant*) is merely a species or modification of *appurtenance*. The distinction, as drawn by Coke and Blackstone, is merely, that into common appendant there enters the notion of the feudal relation constituted by tenure: the right is a right enjoyed by each person having a house or land within the manor, against the lord who is the owner or against other parties within the manor: while in the case of common appurtenant, the same right exists without any relation arising from tenure.

Another instance of a servitude is a right to a pew in church. In some cases, there is a right to a pew by *præscription* as appurtenant to a messuage; in other cases, a pew is granted to a person by the ordinary; in that case, it is an easement in gross. It is clearly an easement; being a right to go into and use a particular part of the church as against the parson in whom the freehold of the church resides.

From the distinction between real and personal servitudes, I proceed to certain rights, which, in the language of the Roman Law, and of the modern systems which borrow its terms and classifications, are improperly (as I conceive) styled servitudes. For, in all these cases, the party entitled to the so-called servitude has an indefinite power or liberty of using or dealing with the object. The right, therefore, is not a definite subtraction from the indefinite power of user or exclusion residing in the owner of

The modes of *property*, which, in the language of the Roman Law, and of the modern systems borrowing its terms

⁵⁴ [v. v.] Origin of the names real and personal servitudes. See Table II. Note 5, § 4, *post*.

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the subject. It is not a servitude properly so called, but a mode of property or dominion.

The party has *condominium* (or joint property, or property in common) with, or concurrently with, another owner; or some right of property of limited duration (as an estate for life or years) upon which the right of property in the other owner is expectant in remainder or reversion.

Unless, at least, these so-called servitudes be modes of property, I cannot perceive that there is any intelligible distinction between *dominia* and *servitutes*, or account for the terms wherein the latter are commonly distinguished from the former. All the rights in question are, it seems to me, rights of property for life.

1. The first is *ususfructus*; a right of completely enjoying the whole subject for life merely under certain restrictions. The entitled party cannot cede his usufruct so as to put the alienee in his own place, though he may let it out, reserving a reversion to himself. We should call this right, I think very justly, an estate for life.

2. The next is *usus*: which in practice is a mere mode of usufruct, that is, the same right with some additional limitations in point of user.

3. The next is *habitatio*: also a mode of usufruct. This is a right of residing in the house which is the subject of the right; and a power of dealing with it, not positively defined or circumscribed, but still more restricted than in the case of *usus*. The party must use it for his own habitation; he cannot alienate it; but still his power of user is indefinite: it is an estate for life restricted in point of user.

4. The next is *operæ servorum*: a so-called servitude over a person; not however a servitude, but a letting of a slave, for the life either of the slave or of the party to whom he is let, with a reversion to the party who lets. This, therefore, is a life interest in the slave amounting to a mode of property. A servitude in the proper sense can hardly exist over a person. The master of a slave would not be likely to let him out for some one specific use, as (for example) for cleaning shoes.

All these various rights of *ususfructus*, *usus*, and *habitatio*, would be deemed (I think) by English lawyers, rights of property (for the life of the owner) variously restricted in respect of the power of user.⁵⁵ In our own law, we have various modes of property, variously distinguished from one another by similarly

⁵⁵ See note on this subject at the end of this Lecture.—R. C.

varying limitations to the power of user: some of such restrictions being set by the dispositions of the authors of the interests; and others, by dispositions of the law in default of such private provisions. For example: tenancy for life, with or without impeachment of waste, tenancy by the curtesy, tenancy in dowry, etc.: In each of which cases, the indefinite power of user is restricted somewhat differently.

A remarkable thing is, that these miscalled servitudes are the only servitudes which are styled formally and usually, *personal servitudes*: Although it is manifest that a servitude properly so called, or importing a power of using which is defined or circumscribed exactly, may not only be a personal servitude, but is the *only* personal servitude that is entitled to the name.

It is, indeed, admitted, by the Roman Lawyers and their followers, that if a servitude (which commonly is prædial or real) be not annexed to a *prædium* (but to the person of the party entitled) it becomes, for that reason, a personal servitude, and consequently is a species of *ususfructus* or *usus*.⁵⁶ For example: A right of way in gross, or not appurtenant to a land or mesuage, is a *personal* servitude, according to this admission.

Here, however, is a mistake. For though it would be a personal servitude, it would not be *ususfructus*: *ususfructus* imparting to the party entitled an indefinite power of user,⁵⁷ and being in effect a mode of property.

And admitting that these improper servitudes *are* servitudes, why should *all* of them be placed in the category of *personal* servitudes? For it is conceivable (though not likely) that the usufruct or use of one thing may be appurtenant or annexed to the property or occupation of another. And admitting that these improper servitudes are servitudes, it is inconsistent to exclude the *superficies* and *emphyteusis* from the same category. For the improper servitudes, like these, import a power of indefinite user, and, like these, may be rights of indefinite duration: *i.e.* reside in the party and his heirs.

⁵⁶ Mackelvey, vol. i. p. 87.

⁵⁷ I am inclined to think that the right of the *fructuarius* to the use and fruits was of a nature more circumscribed than the author seems to allow, and that the only difficulty in ascertaining the precise line of demarcation between the rights of the *fructuarius* and the *dominus* arises from the fact that it was so fixed by custom as seldom to occasion a question of dispute. With regard to rights over a *fundus*, at least, this is what we should expect, where modes of cultivation were

unvarying. In the titles to the Digest on the various interdicts, there are many indications as to the extent of interest belonging to the *dominus* and *fructuarius* respectively. The title 'Quod vi aut clam' (D. xliii. 24) is especially instructive. This interdict was competent only on the ground of injury to the *solum* (the property of the *dominus*), but the *fructuarius* could resort to it to protect his own interest so far as affected by the injury in question.—See note at the end of the Lecture.—R. C.

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It seems indeed to have been perceived (though not very distinctly), that these improper servitudes were not truly such. For (first) although they are styled servitudes in various passages of the Pandects, they are not styled servitudes in the Institutes, but are marked *seriatim* by the names of their respective species. Describing things incorporeal (or rights) Justinian, in his Institutes, says, 'Eodem numero sunt jura prædiorum, urbanorum et rusticorum, quæ etiam servitudes vocantur.' And having treated of *servitudes* (limiting the term to prædial or real servitudes), and having treated *seriatim* of usufruct, use, and habitation, he adds, 'Hæc de servitutibus, et usufructu, et usu, et habitatione dixisse sufficiat.' ⁵⁸

So that in the Institutes, the term *servitus* is limited to *real* servitudes; *usufructus*, *usus*, et *habitatio*, are not deemed servitudes; and personal servitudes, properly so called, are passed over without notice.

Precisely the same method is followed in the French Code. In the second title of the second book, property or dominion is treated of. In the third title *usufruit*, *usage*, and *habitation* (which are not called servitudes), are handled *seriatim*. And the fourth title is devoted to *Servitudes* or *Services fonciers*: i.e. real or prædial servitudes. So that in the French Code, as well as in the Institutes, personal servitudes properly so called are not formally mentioned.

Secondly, by Savigny, in his Treatise on Possession, it is remarked, that the possession of a right of usufruct, or of a right of use, resembles the possession of a thing, by the proprietor, or by an adverse possessor exercising rights of property over the thing. And that a disturbance of the one possession resembles a disturbance of the other. ⁵⁹

Now this must happen for the reason I have already stated: namely, that the right of usufruct or user, like that of property, is indefinite in point of user. For what is possession (meaning legal possession, not mere physical handling of the subject) but the exercise of a right?

This leads to the distinction between *possession* and *quasi-*

⁵⁸ Institutes, ii. 5, § 6.

⁵⁹ 'Die persönlichen Servituten haben das Eigenthümliche, dass die Ausübung derselben immer mit dem natürlichen Besitz der Sache selbst verbunden ist.'

...
'Erworben also wird diese Art des Besitzes durch dasselbe Handeln, wie der Besitz der Sache selbst,' etc. . . .

'Das Recht dieser Servituten ist an eine bestimmte Person gebunden, folglich unveräußerlich, folglich hat selbst die Veräußerung derselben (durch Verkauf, Schenkung, etc.) im Wesentlichen keine andere Wirkung als eine blosse Verpachtung.'

Savigny, *Recht des Besitzes*, 5^{ter} Abs. § 45.

possession. Each is a mode of possession, and each (considered as legal, not physical possession) consists in the exercise of the corresponding right. Now possession properly so called is the exercise of the right of property, either by the proprietor or by somebody holding *adversely* to the proprietor, who on that adverse possession may by *præscription* found a right as against the proprietor himself. *Quasi-possession* again is the exercise not of a right of property, but of a right of servitude: distinguished from possession of a right of property in this, that as in the one right the uses are indefinite in number, and in the other exactly defined, *possession* is indefinite user, and *quasi-possession* is definite user of the subject. Since, therefore, Savigny assimilates possession of a right of usufruct or use to the former and not to the latter, the true nature of these improper servitudes must have been perceived by him, though not distinctly stated. For he says, *quasi-possession* of *usus* and *usufructus* is not like *quasi possessio* of a real servitude, but like *possessio* of a right of property.

Note.—On the difference between *usufructus*, etc. and the life estates known to the English law.

I think that in the above Lecture the author has assumed a closer analogy than really exists between the *usufructus*, etc. of the Roman and the life estates known to the English law. I believe that the difference is an important one.

For the sake of simplicity I will consider the largest of the estates in question known to the Roman law, namely, *usufructus*, and shew how it differs from the life estate of freehold known to the English law.

Usufructus, according to its original conception, was a right which inhered in the person of the *fructuarius*, and by the old *jus civile* it was deemed intransmissible and indivisible. By the same *jus civile* it could not be the subject of a tenancy in common, although it might belong to two or more persons as *joint tenants*, with *jus accrescendi* to the survivor. The most formal mode of constituting such joint tenancy in usufruct was ‘*Usufructum do, lego, Sempronio et separatim Titio.*’ *Usufructus fundi*, though constituted (‘*deductus*’) by *mancipatio*, was (in the law before Justinian) itself a *res nec mancipi*. It was lost, like any other servitude, *non utendo*, except in the so-called *usufructus pecuniæ*, which was not properly usufructus at all, for the *dominium* was there deemed to be with the *fructuarius* (*Vat. Frag.* 45, 47 ; 75-77).

By the *jus civile* the *fructuarius* did not *possess* the *fundus*—a convenient doctrine, which had the advantage of rendering the right of usufruct consistent with a positive prescription of very short period. He had, however, quasi-possession of the usufruct and *naturalis possessio* of the subject, which enabled him to use the various interdicts to protect his interest.—See Dig. xliii. 26 (*De precario*), l. 6, § 2 ; and cf. Dig. xliii. 17 (*Uti possidetis*), l. 4 ; and Dig. xliii. 24 (*Quod vi aut clam*), l. 16 ; and Savigny, *Recht des Besitzes*, § 7 *Civilis et naturalis possessio*.

But the difference between the Roman *usufructus* and the English life

LECT. I

estate of freehold is not one depending merely on the rules of the *jus civile* or on the modes by which usufruct was constituted and lost.

The substantive rights of the *dominus* and the *fructuarius* respectively are shortly expressed by saying that the right to the *solum* is in the *dominus*, that to the *fructus* is in the *fructuarius*. In subjects capable of use and enjoyment, such as a house and pleasure-grounds, the usufruct gave a right to the *amanitas*, which both the *dominus* and all others can be restrained from infringing. Subject, however, to the right of the *fructuarius* to the fruits and to the *amanitas*, the *dominus* had a present right in the *solum*, including all things of a permanent nature adhering thereto or growing thereon. Consequently, such trees as were neither fruitful, nor conduced to the *amanitas*, were absolutely at his disposal, and the *fructuarius* was neither interested in them nor responsible for the care of them. There was an exception in *silva cædua*, which, when cut at maturity, generally went to the profit of the *fructuarius*. Dig. xliii. 24 (Quod vi aut clam, etc.), l. 16, 18.

It necessarily follows, and I think it is assumed throughout the passages in the Digest bearing on these rights, that the *dominus* had, notwithstanding the usufruct in the other, a right of entry upon the premises, provided only he abstained from interfering with the complete and ample enjoyment by the other of the rights which the usufruct conferred. The extent to which the *dominus* might avail himself of his right of entry must, no doubt, have depended on the nature of the subject. In the case of a house and pleasure-grounds, of course the entry by the *dominus* was practically suspended, except so far as might be necessary for the sole purpose of protecting his reversionary interest; but in the case of a *fundus* consisting of rural subjects, the *dominus* might have many rights in the *solum* which could be exercised without interference with the *fructus* or the *amanitas*. The substantive right in the *dominus* being clear, his right of entry is generally, by the Roman jurists, tacitly assumed. But there is one passage that places this right beyond doubt. It is explicitly stated by Ulpian that the *dominus* had the right to use, without obstruction from the *fructuarius* of his own farm, a servitude road belonging to this farm over that of a neighbour. Dig. xliii. 19 (De itinere, etc.), l. 3, § 6. It follows, by necessary implication, that he had a right of entry upon the ground of his own farm itself.

In Scotch law, the right of *liferent* is in most of its incidents, as well as in its conception, modelled upon the usufruct of the Roman law, and is by Stair and Erskine classed with personal servitudes.

Like the usufruct of the old *jus civile*, *liferent* is personal to the *liferenter*, and although the *liferenter* be *infest*, he cannot so transmit his right as to *infest* his assignee. The assignee of a *liferent* cannot consequently acquire a complete *real* right, although he may get what is practically equivalent to it, either by insisting on actual possession, or by giving notice of his right to the tenants of the lands.

Speaking generally, and in the absence of special provision to the contrary, a right of *liferent* excepts coal, lime, quarries, minerals, etc., although these are by the law of Scotland considered to be part or parcel of the land; and the *fiar* (i.e. *dominus* or reversioner) may enter and work them, paying surface damage, provided he do no novel injury to the *amenity* of the *liferenter's* possession. The *fiar* may also cut and sell the timber, so as not to injure the *amenity*.

From what is said above, it is evident that there is room for a clear distinction between such rights as *usufructus* and *liferent* in the Roman and Scotch law on the one hand, and the various life estates known to the

English law on the other. It follows that those who class the former rights with servitudes are not more unphilosophical than those who class them with rights of property. The distinction between property and servitude is, indeed, arbitrary, as the author seems to admit; and it may be questioned whether any intelligible ground of distinction exists, unless we say that property is the residuary right under burden of the servitude. And this is, I believe, the *ratio* of the distinction as understood by the Roman lawyers. Perhaps it may be added that to constitute *dominium* as opposed to *servitus*, the residuary right must be of a description to which *some* present enjoyment is generally incident.—R. C.

LECTURE LI.

RIGHTS IN REM DISTINGUISHED IN RESPECT OF DURATION.

I HAVE considered such distinctions between primary *jura in rem* as are founded on differences between the degrees wherein the entitled persons may use or deal with the subjects.

Primary Rights, etc.
Rights in rem, per se.

But primary rights of the class are also distinguishable by differences between the quantities of time during which they are calculated to last. And whatever be the quantity of time during which it is calculated to last, or whatever be the extent of its duration, a primary right of the class may be present or future; or, in other words, may be vested or contingent. And if it be present or vested, it may be coupled with a right in the party to present enjoyment or exercise, or the right of the party to enjoy or exercise may be presently suspended or postponed. One person, for example, may have an estate for life with remainder in fee to another; in which case, the latter has a present or vested right, but has no right to present enjoyment, his right to the enjoyment of the subject being suspended by the pendency of the right in the first taker.

From distinctions founded on differences between the extents of user, I shall proceed to the distinctions which I have now suggested: namely, the distinctions which are founded on differences between the durations of rights; between present or vested rights, and future or contingent rights; and between such present rights as are coupled with a right to present enjoyment, and such present rights as are coupled with a right to enjoyment to commence at a future time.

In treating of rights in respect of their different durations, I shall follow the method which I observed when treating of rights in respect of the different powers of user respectively annexed to them: that is to say, *I shall assume that they are present or vested.*

Of such distinctions between rights as are founded on dif.

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Before I proceed to the distinctions between rights which are founded on differences between their durations, I must remark that these distinctions are inseparably connected with matter which I shall discuss in future lectures: namely, the various modes or titles by which *jura in rem* are respectively acquired and lost; or the various facts or events (or the various *causæ*) whereon rights of the class respectively begin and end. For example: before we can understand exactly what is meant by a right of unlimited duration, we must know the nature of *descent* or of succession *ab intestato*. And before we can know the nature of *absolute* property (or of property unlimited in duration, and alienable from those who without alienation would succeed on the death of the owner), we must know the various modes by which the right is alienable, either voluntarily or involuntarily: that is to say, with the free consent of the owner (as in the case of a sale or gift), or in the owner's despite (as in the case of his bankruptcy, or of forfeiture for a crime). (I apprehend that any event of whatever nature is called an alienation, which carries the right over to another person than the owner or the persons who are appointed by the law to succeed in case no alienation takes place: If the alienation take place by the free consent of the owner, it may be called voluntary alienation; if in the owner's despite, involuntary.)

The connection between the consideration of rights in respect of their duration, and the consideration of the titles or means by which they are acquired, is so intimate, that it has been proposed by some writers to consider the duration of rights under the several modes by which they are acquired. Among these is Mr. Humphreys, in his Outline of a plan for codifying the law of real property.

Much of what I shall utter, in regard to the distinctions between rights which are founded on their various durations, will therefore refer to the modes or titles by which rights are respectively acquired and lost. And such is the intimate connection between the various departments of every legal system, that such reference forward to matter yet unexplained, is an inconvenience which cannot be avoided by any expositor of law, although by long and assiduous reflection it might be considerably reduced.

Rights
 considered
 in respect
 of duration

Of such distinctions between rights as are founded on differences between their respective durations, the leading or principal one is this: that some are rights of unlimited duration,

whilst others are rights of limited duration; a right of limited duration being either of a duration definite as well as limited, or being of a duration which, though limited, is not susceptible of exact circumscription. For example: An estate in fee-simple, or absolute property in a personal chattel, is a right of unlimited duration. Property for the life of the owner, or for the life of another, is a right of limited but indefinite duration. Property for a given number of years is a right of a duration limited and defined.

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are, Of limited duration; Of duration limited but not definite; or, Of definite duration.

It is obvious to remark, that, in respect of the party who actually bears the right, a right cannot be a right of unlimited duration. In regard to the party who actually bears the right, the right must cease on his death, if it cease not sooner.

By a right of unlimited duration, we must therefore mean, a right which may devolve from the party entitled through a series of successors of a given character or characters,⁶⁰ which may possibly last for ever: meaning by a series of successors which may possibly last for ever, a series of successors to the continuance of which there is no certain and assignable limit. By the extinction of the series of successors, by the annihilation of the subject of the right, or by various other intervening contingencies, the right may cease. But there is no certain and assignable event (or no certain and assignable event imported by the right itself) on which the right must necessarily determine.

Right of unlimited duration.

For example: An estate in fee simple, or an estate in fee tail, may devolve from the actual owner, or from the party actually bearing the right, through a series of heirs which may possibly last for ever: that is to say, through a series of heirs to the continuance of which there is no known and assignable boundary.

As I have already remarked, the nature of a right of unlimited duration cannot be understood completely, without a foreknowledge of the nature of descent or of succession *ab intestato*. In order to the existence of a right of unlimited duration, it must be capable of devolving *ab intestato* from the party actually entitled, through an infinite series of successors, each of whom may take by descent; the first taking by descent from the party actually entitled; the second taking by descent from the first; and so on *in infinitum*.

⁶⁰ More accurately, I think, a series titled. E.g. A is entitled for life, remainder to the heirs of his testator. I understand the author to call A's right referring by way of DESCENT (explanation of this term postponed) to the party en-

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I say it must be *capable* of devolving in the manner which I have now described through a series of successors which may endure for ever. For assuming that the right be alienable from that series of possible successors, either by the party actually bearing it, or by every or any in that series of possible successors, the right itself would cease on an actual alienation, and a new right over the subject would begin in the alienee.

I think, then, that a right of unlimited duration may be defined in the following manner: It is a right for the life of the party actually entitled, and capable of devolving *ab intestato* through a series of successors which may continue infinitely: meaning by infinite, infinitely, and infinitude, all that we can ever mean by those expressions: namely, the absence or negation of any end or limit which it is possible to assign.

The idea of a right of unlimited duration is therefore so inseparably connected with the notion of descent (or with the notion of succession or devolution *ab intestato*), that it is scarcely possible to explain the former without explaining the latter.

Sir William Blackstone's notion of a right of unlimited duration accords with that which I have now stated. (See vol. ii. chap. vii.)

Right of
limited
duration.

By a right of limited duration, I mean a right which cannot continue beyond the happening of a certain and assignable fact, whether the duration of the right be definite or indefinite.

In the case of a right of unlimited duration, there is no certain and assignable limit beyond which it cannot endure. In the case of a right of limited duration, there is a certain and assignable limit beyond which it cannot endure: although the precise time at which the event which constitutes that assignable limit may happen may not be capable of determination.

In the case, for example, of a right for a given number of years, the right cannot endure beyond the lapse of the given period. And in the case of property for the life of the actual owner, or for the life of another person, it must determine on the death of the owner, or on the death of the other person, though the time of that death is not of itself certain.

A right of
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does not
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A right of unlimited duration (as I understand the expression) is not of necessity alienable by the party actually bearing it, from the possible series of successors *ab intestato*. For example: According to the older English Law, the tenant in fee simple could not alien (even with the consent of his feudal superior) without the consent of the party who was then his apparent or presumptive heir. And the case seems to have been the same

in all the legal systems which obtained through different parts of Europe under the general name of the feudal system. It is a mistake to suppose that by the feudal law the restrictions on alienation were designed for the advantage of the feudal superior only. They appear, from the fact I have just stated, to have partly had in view also the advantage of the person appointed to succeed. Analogously, in the Roman Law, domestic heirs, as they were termed, had a right against the actually entitled party, who could not alien from them, or could do so only in a certain manner. The children were said for this reason to be *quodammodo domini*, vivo quoque parenti (I mean by the old Roman Law, as we learn from Gaius, and from the Pandects). And in the Greek versions of the Roman law books, the heirs who were termed *sui et necessarii*, went by the name of *αὐτοκληρόνομοι*. They seem to have taken not merely by descent from the party originally entitled, he having a complete power of diverting the right from them, but rather as being in a manner themselves entitled jointly with him. And, in English law, until tenants in tail were able to alien from the heirs in tail by fine or recovery, the estate tail was not alienable from any of the series of possible successors on whom by the creator of the estate it was destined to devolve.

I have made these remarks because property of unlimited duration, and absolute property (or property with a power of aliening from the future successors *ab intestato*) seem to be often confounded. Many writers on law suppose this power to be of the essence of a right of unlimited duration. But I conceive that it is not so, although it is of the essence of *dominium* in the narrowest sense, or of property pre-eminently so called.

As I shall endeavour to shew immediately, absolute property is always accompanied with such a power of aliening. But property of unlimited duration (as an estate in fee simple or an estate in tail) is not of necessity absolute.

But whenever a right of unlimited duration is not alienable by the party at present entitled from the series of possible successors *ab intestato*, the right of the party actually entitled is in effect an estate for life.

For example: If a tenant in tail had never acquired the power of aliening, by the introduction of fines and recoveries, the estate of a tenant in tail would in fact have been nothing more than an estate for life. Each of the series of successors would have taken only an estate for life. (By the introduction of fines and recoveries, an estate tail has become, to every

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practical intent or purpose, tantamount to an estate in fee. The only difference is, that the tenant cannot alien except by those peculiar modes.)

Nor is alienability confined to rights of unlimited duration.

In confirmation of this view of the matter, it may be observed that the power of aliening from those who in default of such alienation would take, is not peculiarly attached to rights of unlimited duration: it may reside in the party invested with a right of limited duration, in a tenant *per autre vie*, or even a tenant for years. The party entitled may die before the expiration of his estate: the residue of the estate must then in default of alienation go over to his own successors as appointed by the law; consequently he may have a power of aliening it from those successors. The power of aliening, therefore, will not serve to distinguish rights of unlimited from rights of limited duration.⁶¹

Restrictions on alienation when allowed in practice.

But though alienability from the successors *ab intestato* is not rigorously of the essence of a right of unlimited duration, it is scarcely possible to conceive that, in any society, all or most rights *in rem* should be unalienable. If most rights of property were unalienable, all commerce would be at an end. In fact and practice, therefore, in every system it is only in comparatively few cases that such rights are unalienable; and even where such restrictions on alienation are permitted, the power of tying up, as it is called, is generally confined within very narrow limits.

These cases are of two kinds:

1st. Those in which he is prohibited from aliening the very right, or the *res singula*, which is the subject of the right: *e.g.* The English tenant in fee, according to the old law.⁶²

⁶¹ But I must observe that in English law, in rights of (so-called) limited duration, the party entitled cannot alienate *so as to defeat the reversioners or substitutes*. And although it is possible to conceive a system in which this should be otherwise, it is not likely to be the case in any; because if the person entitled could *alienate from the substitutes*, lawyers would probably find means whereby he could convey to *himself* and his own heirs for ever. He would, therefore, have an estate of unlimited duration, *contra hypothesin*.—R. C.

⁶² Or the heir in possession of a Scotch estate, held under the fetters of a strict entail dated before 1848. I may here observe that the form of a Scotch strict entail is very instructive as to the real nature of the restraints upon alienability which, permitted to a

modified degree in English law, are, by a curious caprice of that law, conceived to be bound up with estates of (so-called) limited duration.

The theory of the Scotch law is this: All rights of property in heritable subjects (which are commonly immovables), are generally transmissible according to an order of succession, either determined by private disposition, or by the general law of inheritance: and it is of the essence of property that the person presently entitled may *disponere* (grant away) the property, not only *from himself*, but *from all the successors* according to the existing destination, in favour of any person and any order of successors he pleases, whether described by way of *descent* from the last taker (heirs general, heirs of the body, etc.), or by substitution of new persons and series.

2nd. Cases in which he is prevented from aliening from his successors the *universum*, or some portion of the *universum*, of the transmissible rights which may happen to reside in him at his death. *E.g.* The older Roman law; the Roman law as modified by the *legitima portio*; the French law of succession.⁶³

Where he is prohibited from aliening from his successors the *universum* of the rights which may happen to reside in him at his death, he is permitted to alien any of the single rights of which that complex and fluctuating whole, constituting the *universum* of his rights, may happen at any time to consist. The whole or any part of them is also liable for his debts. And it is only with reference to his rights as considered singly or particularly, that he can be said to have a right of absolute property.

Limitations to right of alienation to prevent fraud on successors.

The party may destroy, spend, or consume, etc.: But may not give, except subject to certain limitations. Or if the gift be fraudulent, it is prohibited.

In what sense property in a personal chattel is a right of unlimited duration.

It may devolve *ab intestato* through a series of administrators representing the owner.

But it is not likely that it should: Because it forms a part of the university of his rights, and is therefore likely to be aliened for debts, etc.

Besides, the *universum* being divisible amongst next of kin, no one right is likely to continue in the same line of takers.

It would seem that the property is rather absolute (*i.e.* alienable from all possible successors) than of unlimited duration.

I shall now attempt to explain the notion of absolute property, or *dominium* pre-eminently so called.

According to the definition of the Roman lawyers, of the French Code, of Blackstone, and others, in fact by most writers, it means a right indefinite in user, unlimited in duration (that

Absolute property defined.

But by a set of conditions, ingeniously devised, and by the aid of a declaratory statute (1885), c. 22, proprietors were enabled to *tailzie* their lands, that is, to make a destination of their estates so as effectually to fetter the power of alienation of future proprietors. The general principle of the law being that the right of property includes power of alienation, the *fettlers* are most ingeniously devised to defeat this principle in every possible

contingency, and consequently the *fettlers* of a Scotch deed of tailzie very compendiously express most of the real points of difference between the modes of property distinguished in the law of England by the terms 'estate for life' and 'estate of inheritance.'—R. C.

⁶³ And the Scotch law of succession in moveables (that is, *administrable property*) where the rights of the wife and children have not been renounced.—R. C.

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is, capable of going over to a series of successors *ab intestato* which may possibly last for ever), and alienable by the actual owner from every successor who in default of alienation by him might take the right.

Power of alienation from every possible successor is of the essence of absolute property.

It is certain that the power of alienation is of the essence of the Roman property or *dominium*. It is also of the essence of absolute property as conceived by Sir William Blackstone.⁶⁴

I say that property pre-eminently so called is alienable by the actual owner from every successor who in default of such alienation might take the subject. It therefore implies more than the power of aliening from his own successors *ab intestato*. For even where a right is a right of unlimited duration, another right may be expectant upon it. This, for example, is the case wherever a mesne lord of the fee is interposed between the tenant in fee and the king; the estate of the tenant in fee might devolve on his heirs general *ad infinitum*, but he could not, by any alienation from his own heirs, affect the interest of the lord of the fee.

Absolute property in land distinguished from our estate in fee simple.

Consequently, in English law, there is no property in land which comes up to the idea of absolute property.

We may conceive generally that, although the right of the present owner be a right of unlimited duration, any number of rights of limited or unlimited duration may intervene between it and the sovereign or state as *ultimus hæres*, or the party who may occupy the right on failure of all entitled parties as being *res nullius*. For, in different systems of law, the provisions as to the party who is to take on the expiring of all preceding rights, may of course differ. It is generally the sovereign or state (the fisc), and in England, the king, who for these purposes may be considered as representing the state. But, instead of itself assuming the right, the state might allow it to go to the first person who might choose to occupy it.

Properly speaking, then, there is not in the law of England any absolute property in land, in case there be any mesne lord interposed between the tenant and the king. For, there is a reversion in the mesne lord, which the tenant cannot defeat, though he may alien from his own heirs.

And from the Roman *emphyteusis*.

And this explains what for a long time puzzled me: the nature of the Roman *emphyteusis*. Our tenant in fee, where there is a mesne lord interposed between the tenant and the king, has an interest precisely like that of the tenant of the *emphyteusis*, that is, a lease to a man and his heirs general, with

⁶⁴ Blackstone, vol. ii. 447.

reversion to the lessor in case those heirs should fail, or the rent reserved should not be paid: namely, not only in case of failure of the heirs of the party himself, but of failure of the heirs of any party to whom he might assign the *emphyteusis*. In the same manner, an estate in fee simple reverts to the lord of the fee, on failure of heirs to any assignee of the estate. The two rights are exactly similar. Neither of them, therefore, is absolute property in the strict sense. Neither imports a right in the party entitled of aliening absolutely from all those who may possibly take the right. And hence it must have been that the right of a party in an *emphyteusis* was ranked by the Roman lawyers among the *jura in re aliena*: because there is a party having a right which the *emphyteuta* cannot possibly defeat or touch, and out of which his own right is, as it were, carved.

In the case of property in a personal chattel, the above reasoning does not apply. There is no party interposed between the owner and the *ultimus hæres*, whoever that may be.

I have hitherto assumed that to constitute property or *dominium* pre-eminently so called, the right of the party actually entitled must be a right of unlimited duration, and in all established systems of law, that is actually the case. If the party did not alien, the right would go over to a series of successors *ab intestato*, which might possibly endure for ever. But it is possible to conceive, that the state might grant out property in land for life or years, with immediate return to the state itself, and might grant to the party to whom it gave this right of limited duration, a power of user, as unlimited as is possessed by the owner of personal chattels. We might then say that the party had property or absolute dominion in the subject, notwithstanding the limited duration of his right.

Unlimited duration, though coupled with absolute property in all established systems, is not necessarily involved in it.

Rights of Limited Duration.

1° A right which cannot continue beyond a given event that will certainly happen, although the duration of the right may not itself be susceptible of exact circumscription.

2° A right to last through a period which must cease on the happening of a certain event, although the time at which that event may happen cannot be determined.

Rights of limited duration, are rights of measured or exactly defined duration, or rights of unmeasured duration: meaning by measured, measured according to the legal measure of time,

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let it be what it may: *e.g.* so many revolutions of the earth round the sun, or of the earth on its own axis, etc.

[Cannot go into metaphysical difficulties about time. 1°. Because in different systems of law, that which constitutes the common measure of time (or rather, perhaps, that which constitutes time itself), is determined very differently; 2°. Because I have scarcely a tincture of mathematical or physical science.]

[*E.g.* An estate for life: an estate for years.]

In case of a right of limited duration, succession is just as possible as in a right of unlimited duration: *e.g.*: in case of estate for years, or per autre vie. But here, it cannot endure beyond the limited period.

Alienability is not less incident to rights of limited, than to rights of unlimited duration.

In case the right be a right of property, power of user is also indefinite. But it never can extend to the destruction of the subject, or (what is the same thing) to depriving it of all the properties which make it a fit subject for human enjoyment or use. For the expectant on the rights of limited duration, there is necessary (or almost necessary) a right of [conservation],⁶⁵ or (what comes to the same thing) a right *quasi* in the sovereign or state. But where there is merely a reverter to the state, the power of user may extend to destruction.

Note.—I confess that I have had some difficulty in comprehending the nature and purport of the distinction laid down by the author in the above Lecture, but having, as I think, after some trouble, discovered the *rationale* of it, I will state what appears to me the reason of the author's taking so much pains to examine a distinction whose net consequences appear so limited.

In English law, the distinction between rights of property conceived as limited in point of duration, and those conceived as unlimited in point of duration, is of great practical importance. The right of (so-called) unlimited duration carries with it the *right of alienation* by the person entitled, not only from *heirs* (whether general or of a particular class), but also from all persons having any kind of *opes successionis* by way of remainder or substitution; whereas the person entitled to an estate of (so-called) limited duration, can alienate only from himself and those who would be entitled by *descent* from him, and not from those entitled by way of remainder or substitution. A further consequence of the distinction arises by way of corollary to the other, namely, that in rights of the first class the power of user by the person entitled is more extensive than that in rights of the last class, inasmuch as, in the last case, the proprietor having it in his power

⁶⁵ ; or, prevention of waste. See Blackstone uses the expression, 'prevention of waste,' vol. iii. chap. xiv. The tivo redress.—*S. A.* word is illegible in the original MS.

to disappoint altogether the hopes of successors, cannot be supposed to injure them by *waste* (or partial destruction of the subject). LECT. LI

In consequence of its importance in English law, the author is led to state and examine this distinction. The net result is this: 1. The distinction (such as it is) is neither adequately nor appropriately described by the expressions 'rights of unlimited duration' and 'rights of limited duration.' The distinction (such as it is) really being, between *rights capable of devolving by way of DESCENT* (a term of which the full definition must be reserved for the subject; of succession *ab intestato*) to a series of successors which may last indefinitely, and rights not capable of transmission by descent to such a series. 2. The power of alienation from substitutes, and the consequent large right of user which, in English law, are incident to rights of (so-called) unlimited duration, are neither of them necessary incidents of that right.

The distinction therefore, from its grave consequences in the English law, requires notice. But, in the view of general jurisprudence, it is not very important.—R. C.

LECTURE LII.

ON THE *JURA IN RE ALIENÂ* OF THE ROMAN LAW.

IN my last Lecture, I considered such distinctions between primary *jura in rem* as are founded on differences between their respective durations: or, in other words, between the quantities of time during which they are respectively calculated to last. LECT. LII

According to the purpose which I then announced, I should now proceed to the distinction between present or vested rights, and future or contingent rights; including the distinction between such present rights as are coupled with a right to present enjoyment or exercise, and such present rights as are not coupled with a right to present enjoyment or exercise.

But before I proceed to the distinction between vested and contingent rights, I will endeavour to explain a distinction, which, I think, may be considered conveniently at the present point of my Course: namely, the distinction made by the Roman lawyers, and by the modern expositors of the Roman Law, between *dominion* strictly so called (*property* pre-eminently so called, *in re potestas*, or *jus in re propriâ*), and that class of rights which they oppose to *dominion* strictly so called (or to *jus in re propriâ*) by the name of *jura in re alienâ*, *jura in re*, or (more briefly and elliptically still), *jura*.⁶⁶

The distinction between *Jus in re propriâ* and *Jus in re alienâ*: *jus in rem in re alienâ*.

I advert to this distinction between *jus in re propriâ* and *jus in re alienâ*, for two reasons. 1st. The explanation of this distinction may tend to illustrate the two capital and insepar-

⁶⁶ Thibaut, *Versuche*, vol. ii. pp. 84, 91. Tables I. II., *post*.

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ably connected distinctions with which my recent Lectures have been particularly occupied: namely, the distinction between rights which import an indefinite, and rights which import a definite power of user or exclusion; and the distinction between rights of unlimited duration and rights of limited duration.

2ndly. Without an idea of the distinction between *jus in re propria* and *jus in re aliena*, as understood by the Roman lawyers and the modern expositors of the Roman Law, their writings, to an English lawyer, are extremely perplexing.

For many of the rights *in rem* which they rank with *jura in re*, or with *jura in re aliena*, would rather be esteemed by an English lawyer modes of property or ownership than mere fractional rights subtracted from property in another. Such (for example) is the case (as I shall shew presently) with the *emphyteusis*: a right closely analogous to an estate in fee simple, and from which (it is supposed by some), the various systems of law, commonly styled feudal, took their origin. Such is also the case with certain rights, which, in the language of the Roman law, are styled *servitutes*: but which, as I shewed in a preceding Lecture, would rather be deemed by us, modes of property. Such is also the case with the right *in rem* of the pledgee or mortgagee, or the creditor whose right *in personam* is secured by a *pignus* or *hypotheca*.

By the Roman lawyers, he is deemed to have *jus in re aliena*, although the pledgor or mortgagor was *dominus* or absolute proprietor of the thing pledged or mortgaged. But according to the law of England (or, at least, of its strict law, as contradistinguished from its equity), his right in the subject of the pledge or mortgage would rather fall under the category of property or ownership, than under that of rights over subjects owned by others.

Property pre-eminently so called, absolute property, *dominium* (s. s.) or *jus in re propria*.⁶⁷

In order to an explanation of the distinction between *jus in re propria* and *jus in re aliena*, I must briefly revert to the nature (which I referred to in my last Lecture) of dominion *strictly so called*, property *pre-eminently so called*, absolute dominion or property, or the dominion (property or ownership) which is the least restricted or limited. For every *jus in re aliena* is a fraction or constituent portion (residing in one party) of absolute dominion or property residing in another party.

Res publica (in the largest sense of the expression).

And in order that I may explain the nature of absolute dominion or ownership, or of *jus in re propria*, I must briefly advert to the nature of *res publica*, or of that right (or rather of

⁶⁷ Thibaut, *Versuche*, vol. ii. p. 85 et seq.

that power) which the state possesses over all things within its territory or jurisdiction. LECT. LII

It is manifest that the state (or sovereign government) is not restrained by positive law from dealing with all things within its territory at its own pleasure or discretion. If it were, it would not be a sovereign government, but a government in a state of subjection to a government truly supreme.

Now since it is not restrained by positive law from dealing at its own pleasure with all things within its territory, we may say (for the sake of brevity, and because established language furnishes us with no better expressions), that the state has a *right* to all things within its territory, or is absolutely or without restriction the *proprietor* or *dominus* thereof. Strictly speaking, it has no *legal right* to any thing, or is not the legal owner or proprietor of any thing: for if it were, its own subjects would be subject to a sovereign which conferred that legal right, and imposed upon others the correlative legal duty. When, therefore, I say that it has a right to all things within its territory (or is the absolute owner of all things within its territory), I merely mean that it is not restrained by positive law from using or dealing with them as it may please.

Consequently, if we take the expression *res publicæ* with the largest meaning which it will bear, all things within the territory of the state are *res publicæ*, or *belong* to the state (in the sense above mentioned).

But of the things which belong to the state, there are some which it reserves to itself, and some the enjoyment or use of which it leaves or concedes to determinate private persons. To those which it reserves to itself, the term *res publicæ* is commonly confined: those, the enjoyment or use of which it leaves or concedes to determinate private persons, are commonly called *res privatæ*. *Res publicæ* (in the narrower sense), and *res privatæ*.

Of *res publicæ* (taking the expression with the narrower sense to which I have now adverted), various distinctions might be made. Classes of *res publicæ* (in the narrower sense of the term).⁶⁸

For there are some, which, without leaving or conceding the use of them to determinate private persons, it nevertheless permits its subject generally to use or deal with in certain limited and temporary modes. Such, for example, are public ways, public rivers, the shores of the sea (in so far as they are not appropriated by private persons), the sea itself (in so far as it forms a part of the territory of the state), and so on. *Res*

⁶⁸ Mühlenbruch, vol. i. p. 163.

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This last notion is derived from the confused notions of a certain natural law and *jus gentium*, which gave rights independently of the state, and superior to any which the state could impart. It is obvious that in so far as these rights are *legal* rights, they must emanate from the state. And the Roman lawyers, occasionally speaking more precisely, say that *res communes* are *quodammodo res publicæ*.

Again: Of *res publicæ* (or of the things which the state reserves to itself), there are some which it reserves to itself in a more especial manner, and some which it concedes to public persons (individual or complex), as trustees for itself. The former are sometimes styled 'the patrimony of the state,' or the 'domain of the state,' or are said to belong to the *fisc*. Such, for example, is the money which it raises by taxes on its subjects, the land which it reserves especially for its own peculiar use, or the *res privatæ* which revert to it by forfeiture or escheat as being the ultimate *hæres* of all its subjects. Those which it concedes to public persons as trustees for itself, are styled by the Roman lawyers *res universitatis*: things being in the patrimony of corporate bodies. And, they were so called (I presume), because the public persons to whom they were conceded, were commonly complex or collegiate, rather than individual persons: as, for example, the corporate governments of cities. But the term *res universitatis* is manifestly inapplicable. For we may conceive that a *res publica* resides in a public person who is individual or single. And every corporate body is not public. Corporate bodies may exist for purposes not public, and then a thing belonging to them is *res privata* not *res publica*. In giving, therefore, to this class of *res publicæ* the name of *res universitatis*, the Roman lawyers took the name of one species and extended it to the whole genus.

It is manifest that the distinctions to which I now have adverted, blend at various points. For example: Of the *res publicæ* which are in the patrimony of the state, or which it reserves to itself in a more especial manner, it may concede some to private persons for periods of shorter or longer duration: It may let, for instance, a part of its domain to a private person in farm. And in these cases, the things would seem to become,

during those limited periods, *res privatæ*. In these cases, however, the things are granted out to private persons, rather for the benefit of its own peculiar patrimony, than for the advantage of the private grantees. Whereas in the case of *res privatæ*, the things are left or conceded to the determinate private persons, rather for their own advantage than for that of the state.

And of *res universitatis*, or things which it concedes to public or political persons, in trust for itself, some will naturally fall under the species of *res publicæ*, which are styled *res communes*. Such, for example, is the case with a road or river, the property of which resides in a public corporation, but which it holds in trust to permit all the subjects of the state to pass and repass it.

One class of things which occurs in the Roman Law, and is there distinguished from *res publicæ*, I will also briefly advert to: namely, *res divini juris*. But *res divini juris* are merely a class of *res publicæ*. They are things specially reserved by the state or granted in trust to public persons, and destined to certain uses. The opposing them to *res publicæ* proceeds from the logical error so frequent in the writings of lawyers: namely, the co-ordinating as parts or members of one homogeneous system, various classes of objects which are derived from cross divisions.

Having given a brief statement of the leading distinctions between *res publicæ* (as opposed to *res privatæ*), I now return to *res privatæ*: that is to say, things of which the state is the ultimate owner, but the use or enjoyment of which it leaves or concedes to determinate private persons, rather for their own advantage, than for the immediate benefit of its own patrimony.

With regard to *res privatæ* (as thus understood), they may be left or granted to private persons with various restrictions: with various restrictions in respect of user, and with various restrictions in respect of time.

In respect of user, the right (or series of rights), which is granted by the state, may amount to a mere servitude (or a right to use the thing in a definite manner), or to property (in any of its various modes). In which last case, the property may be burthened with a servitude (or with a something analogous to a servitude) reserved by the state to itself.⁶⁹

For example: we may conceive that the state may grant to

Quasi-servitus over

⁶⁹ *Communia* may be considered as subjects which the government concedes to others with a right of total exemption: e.g.: taxation.—Hugo, *Enc. lib.* certain *servitutes*. *Res singularum*, &c.; ii. p. 298. Marginal note.

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a thing,
reserved
by the
state to it-
self.

a private person a right of way, or a right of common, over land in its own patrimony. On which supposition, the grantee would have a right analogous to a servitude over the given subject. I say 'analogous to a servitude:' for a servitude, properly so called, is a burthen on the *property* of another; and property properly so called, or *legal* property properly so called, the state has not, and cannot have.

Quasi-ser-
vitus re-
served by
the state
over a *res*
privata.

Or, assuming that the right granted by the state amount to a right of property, we may suppose that the state reserves to itself a something analogous to a right of servitude. For example: we may suppose that it reserves to itself (in case the subject of the property be land) all the minerals under the land, with the right or power of working for them. In most or many countries, all land owned by private persons is held subject to a special reservation like that which I have now mentioned. And, in our own country, the King (who, for the present purpose, may be deemed to represent the State) is also commonly entitled to any of the more precious minerals which may be found under land belonging to any of the subjects.⁷⁰

Absolute
property,
dominium
(s. s.), or
jus in re
propria.

With regard to *time*, the thing may be subject to a right of limited or unlimited duration, or to a series or succession of any number of rights, each being a right of limited or unlimited duration. For, as I remarked in my last Lecture, a thing which is subject to *one* right of unlimited duration, may also be subject to another right of the same unlimited duration. This, for example, is the case with freehold land (according to the Law of England), where the tenant in fee simple is properly a *vassal*, and the interest or estate of the mesne lord is also an estate in fee simple. And if we suppose that the mesne lord held of a mesne lord interposed between him and the king, and that the estate of either lord were an estate in fee simple, here would be three estates (each of unlimited duration) each of which must expire before the land could revert to the king as representing the sovereign or state.

And cases may be imagined, in which the thing would be subjected to a much longer series of rights of unlimited duration, each to take effect in enjoyment on the expiration of the right preceding.

But whatever may be the right (or the series of successive rights) to which the thing is subject, presently or contingently, that right, or that series of rights, must be liable to end. If the right be of limited duration (or each of the series be of

⁷⁰ Blackstone, vol. i. chap. 8.

limited duration), it must end on the lapse of the time fixed for its duration. If it be a right (or a series of rights) of unlimited duration, it must also be liable to end on the failure of persons who by the constitution of the right are entitled to take it.

Now on the expiration of the right, or of the series of rights, to which the thing is subject, presently or contingently, the thing reverts, as of course, to the sovereign or state: for since the state (speaking by analogy) is the ultimate owner of the subject, it also (speaking by a similar analogy) is the *ultimus hæres*. On the expiration of all the rights over the thing, which merely subsist over the thing by its own pleasure, it naturally retakes the thing into its own possession.

But, in different countries, the practice in this respect is different. In some, the thing (generally speaking) is actually resumed by the state as *ultimus hæres*. In others, the state does not exercise its right or power of resumption, but leaves the thing to the first occupant: who, by virtue of his occupancy, takes from the state a fresh right, which is also liable to end like the preceding right, on the extinction of which he stepped into possession.⁷¹

But, in this case of acquisition by occupancy, the occupant may be considered as merely representing the sovereign: or, rather, the thing in effect reverts to the sovereign, and the occupant acquires from the sovereign a new right.

Where, in our own country, the thing is resumed by the sovereign, and is not conceded by the sovereign to the first occupant, it reverts to the king. But the king, although he may be deemed to take by a legal right conferred by the sovereign body of which he is only a member, may, perhaps, more properly be deemed, for this purpose, as merely representing the sovereign. For, according to the old and irregular constitution, in which the prerogative in question arose, the king *was* sovereign; and, instead of sharing the *sovereign* powers with his parliament, great council, or what not, merely received from them suggestions and advice for the guidance of his conduct. There is much, at least, of our legal language, of our established forms of judicial procedure, and even of the forms observed by our present parliament, which cannot be explained on any other supposition. And I observe that Mr. Palgrave (in those parts of his Commonwealth of England which I have had time to examine) appears to lean to the supposition that the king was originally the sovereign.⁷²

⁷¹ Mühlenbruch, vol. i. lib. ii. § 91.

⁷² Commonwealth (ed. 1832), pp. 283, 647.

Now since the occupant takes in the place of the sovereign, and since the king takes as representing the sovereign, I shall assume that the thing, on the expiration of every right to which it is actually subject, invariably reverts to the sovereign government, in every country whatever.

[*v. v.* Interpose a remark on the king's title to personal chattel without owner. (Blackstone, vol. i. pp. 295, 298.)

v. v. In the Roman law, the same rule prevailed in case of dereliction ; which, if the party relinquishing be absolute owner or *dominus*, is, as I shall shew immediately, tantamount to the expiration of every right in the subject.]

With what I have premised, I can now (I believe) determine the nature of absolute property : of dominion strictly so called ; or of *jus in re propria*.

It is not only a right of unlimited duration, and imparting to the owner a power of indefinite user, but it also gives him a power of aliening the subject from all who, by virtue of any right existing over the subject, might, in default of such alienation, succeed to it.

It therefore implies more than a power of aliening the subject from those who might succeed by descent to the unlimited right. It implies a power of aliening from all those possible successors, and *also* from *all other* successors, who, by virtue of any right existing over the subject, are interposed between the possible successors to his own unlimited right, and the sovereign as *ultimus hæres*.

The mesne lord has not absolute property. He has merely *nuda proprietas* (or *proprietas* simply) : *i.e.* absolute property subject to a right of indefinite user (as well as of unlimited duration) residing in the tenant. In the language of the English law, he has merely a *reversion* expectant on the determination of the tenant's usufruct : a usufruct unlimited in point of duration. And hence it follows, as I remarked in my last Lecture, that, according to the English Law, there is no absolute property in land : or, at least, there is no perfect dominion in land, where there is a mesne lord between the tenant in fee simple and the king as *suzerain*.

For there is a reversion in the mesne lord which the tenant in fee cannot defeat by his own alienation : though by his own alienation he can divert the land from his own heirs general, or from the series of possible successors to his own right of unlimited duration. If he were absolute owner, he would stand to the

mesne lord in the relation in which tenant in tail stands to those in remainder or reversion expectant on his own estate tail, and whose right, as well as that of the heir in tail, he could defeat by fine and recovery.⁷³

The term property, as, in a preceding Lecture, I opposed it to *servitus*, includes many rights which are not rights of *absolute* property: that is to say, every right of limited, or of unlimited duration, which imparts to the person entitled an indefinite power of user, although it is not coupled with the power of aliening from every possible successor between the party and the *ultimus hæres*.⁷⁴

Having endeavoured to determine the notion of absolute property, of dominion strictly so called, or *jus in re propria*, I can now explain the nature of *jura in re alienâ*.

Jura in re alienâ.

Every *jus in re alienâ* is a fraction or particle (residing in one party) of dominion, strictly so called, residing in another determinate party.

But *jura in re alienâ* have no other common property than that which I have now stated. Different rights of the class are composed of different fractions of that right of absolute property from which they are respectively detached. Some are mainly definite subtractions from the right of user and exclusion residing in the owner. Others are indefinite subtractions from his power of user and exclusion for a limited time; and so on.

Different *jura in re alienâ* are different fractions of the various rights which constitute the *dominium* from which they are respectively detached.⁷⁵

The *jura in re alienâ*, which commonly are marked by modern expositors of the Roman law, are *servitus*, *emphyteusis*, *superficies*, and the *jus in rem* which is taken by a creditor under a pledge or mortgage.⁷⁶ And, to shew the nature of the distinction between *jus in re propria* and *jus in re alienâ*, I will briefly advert to each of the four in the order wherein I have stated them.

The classes of *jura in re alienâ* which are noted by expositors of the Roman Law: viz. *Servitus*,

⁷³ Or by the modern *disentailing assurance*, which corresponds to that proceeding.—R. C.

⁷⁴ Reverting to my former observation (p. 827 *note, ante*) with regard to the question, whether usufruct may not properly be classed with servitudes, *Quæro*: Whether there be room in a philosophical system for the two disparate divisions, viz.

Dominium ∪ *Servitus*.

Dominium ∪ *Jus in re alienâ*.

Is not, in fact, the latter the only philosophical distinction; and are not *servitudes* merely a certain set of *jura in re alienâ* arbitrarily distinguished by the Roman lawyers, and classed by them under the common name?—R. C.

⁷⁵ Thibaut, *Versuche*, vol. ii. p. 85. System, vol. ii. p. 8.

⁷⁶ Mackeldey, vol. ii. p. 6.

LECT. LII *aliena* they opposed to the dominium which heirs and other universal successors take in the aggregate of the rights to which they succeed. This last dominium is of so peculiar a character, that it might be considered apart. I shall, therefore, for the present, understand dominium in the sense of the Roman lawyers, namely, absolute property over some determinate thing.

Emphyteusis, Superficies, and Jus pignoris hypothecæ.

Servitus. Servitudes properly so called (whether affirmative or negative, real or personal) were esteemed *jura in re aliena*, because they gave a right of definite user over a subject owned by another, or of subtracting a definite fraction from the owner's right of user or exclusion.

Servitudes improperly so called (*usufructus, usus, and habitatio*) were property for life limited to life of owner, though the limitation for life was not essential.

When property for life, they were *jus in re aliena*, because they were subtracted from the dominion of the author or grantor, and on their expiration reverted to the grantor or his representatives.⁷⁷

Emphyteusis.

Emphyteusis under the Roman law, meant originally land of which some corporate body (as for instance a municipium) had the absolute property and which was let out to a person and his heirs (that is, for an unlimited duration) in consideration that he would cultivate it (and hence the origin of the term which was analogous to the original meaning of the word *colonists*), and would bring to the owner a given rent. Now this was *jus in re aliena*, because, although of unlimited duration, accompanied with power in the *emphyteuta* of unlimited user, and though alienable from his own heirs, it was nevertheless a right or estate carved out of another estate, or having a reversion expectant upon it. It reverted to the author or grantor or his representatives. It was not absolute property, because there was no power of aliening from all future succession.⁷⁸

The relation of the *emphyteuta* to the *dominus emphyteuseos* was the same as that of our tenant in fee to the mesne lord. Each has an estate of unlimited duration with an estate in reversion expectant, which neither part can defeat. *Emphyteusis* answers almost exactly to our copyhold tenure.

Where an estate in fee simple of freehold tenure is subject to a quit rent, there would seem to be a *servitus* in the lord, as lord of the fee.

⁷⁷ Mackeldey, vol. i. cap. 4, p. 103.

⁷⁸ Gaii Comm. iii. § 145.

So in case of copyhold.

So in case of emphyteusis.⁷⁹

Or perhaps an obligation *quasi ex contractu*. Or a *servitus* and an obligation combined.⁸⁰

[Usufruct unlimited in duration, etc., would have resembled emphyteusis.

And this is another inconsistency about those improper servitudes mentioned in a former Lecture. If usufruct be a servitude, so ought emphyteusis to be deemed one; for a usufruct, or any other personal servitude, may be granted to a party and his heirs.]

And here I will remark that the feudal system is supposed by Mr. Palgrave, for whose opinion I have a great respect, to have originated in their Roman institution. He supposes *emphyteusis* to have been the origin of *beneficium* or *feud*. In this, however, I am not inclined to agree. Emphyteusis seems to me nothing more than a common case of a municipium first, and a private proprietor afterwards, letting his land to a man and his heirs for a rent. It is true that, in later times, and during the invasions of the barbarians, the emperors not uncommonly granted out rights analogous to *emphyteuses* on condition of military service; and it is not impossible that this may have suggested the principle of feuds; but it is not likely; because a feud was originally a *beneficium*, or a grant to a party for life.

The feudal system is an expression often used with most perplexing vagueness; and the word feud is often extended to any right, of limited or unlimited duration, granted on condition of military service by the grantee. If the term be used in this sense, the feudal system has probably existed in every part of the

⁷⁹ Blackstone, vol. iii. chap. 15.

⁸⁰ This was certainly the case with the *emphyteusis* of the later Roman law, and probably also with the *ager vectigalis* of the classical period. *Emphyteusis* did not merely imply a *jus in re alienâ* in favour of the *emphyteuta*: it was also a contract inferring a personal obligation by which the *emphyteuta* and his heirs were bound, notwithstanding any amount of depreciation in the value of the subject.—Gail *Comm.* iii. § 145. Inst. iii. 24, § 3. Nov. vii. 3, § 2.

The *feu-contract* familiar in Scotland (essentially the same with the *feu-charter*, only containing the personal obligation in a more convenient form) will furnish the best analogy. The *feu-contract* is in the nature of a perpetual lease, and is in Scotland the usual mode of letting

ground for building purposes. In England, there is now no exact parallel to *emphyteusis*. The nearest analogy is to be found, not in the tenure of the *copyholders* of a manor, which depends on the custom of the particular manor, but in the tenure of the *libere tenentes* under a mesne lord, which originated in contract. But the statute 'Quia Emptores,' 18 Edw. I. prevented any new subinfeudations, and the statute 12 Car. II. c. 24 swept away most of the peculiar incidents of the various tenures of free tenants. There is now, in the case of free tenants, never any fresh investiture of the heirs or assignees, and in these tenures all vestiges of a personal obligation on the tenant (*i.e.* other than as a charge on the land) have long ago disappeared.—R. C.

LECT. LII world. It existed in India; in the Roman empire; it exists in Turkey.

But when we use the word feud in a more specific sense, we mean something incomparably more definite; we always contemplate a feud when it ceased to be *beneficium*, and became hereditary, and accompanied with the incidents of homage, fealty, &c. In these peculiarities the feudal system, considered as a system; stands perfectly distinct. The word feud, etymologically speaking, is probably derived, not as Mr. Palgrave supposes, from *emphyteusis*, but simply from the Latin *fideliis*; and did not originate until feuds changed their character and became hereditary.⁸¹ Like a thousand other notions which have been supposed to be universal and of the essence of law, feuds and the feudal system are really an exceedingly specific and purely historical notion, not to be got at by scientific speculation, but by diligent reading of the history of the middle ages.

I may here advert to an obscure point which has been finely explained by Thibaut with his usual combination of logic and profound learning: I mean the distinction between *dominium directum* and *dominium utile*. The vassal himself was said to have *dominium utile*, but the lord only to have *dominium directum*: now, why the tenant should be said to have *dominium utile* more than any one who has the usufruct or power of using the thing which he has, I cannot possibly conceive. It is merely the obvious case of a right in one person with a reversion in another. But the reason is obvious when we look to the history of *emphyteusis*. Actions were distinguished into *actiones directæ* and *actiones utiles*, that is, into actions given *jure civili*, or by the original Roman law, and actions given by the prætor, *uti*, or by way of analogy, like our actions on the case in the largest sense, which were actions in *consimili casu*. When none of the old forms of action would apply to the case, new actions were given by analogy to the established ones; and these in Roman law were called *utiles*, from *uti* or *quasi*. Now *emphyteusis* was originally merely a prætorian right; it was, consequently, clothed not with an action given *jure civili*, or an *actio directæ*, but a *utilis actio*.

And as a right of *emphyteusis*, though not property, was so analogous to property, a right of vindication was given for it, as for property, and thus again it was analogous. The Italian glossators, seeing these terms *actiones directæ* and *actiones utiles* applied to the cases of *emphyteusis* and absolute property, extended the

⁸¹ See my note on the land contracts word *feudum*, at the end of this Lecture. of the middle ages, and the origin of the —R. C.

terms from the remedies to the rights themselves to which those remedies were attached. They styled the absolute property in the *dominus emphyteuseos*, *dominium directum*, and the *jus in re* of the *emphyteuta* himself *dominium utile*, because the former was clothed with an *actio directa*, the other (as being *like* property) with an *actio utilis*. It was a mere misconception and misapplication of terms.

The next case of *jus in re alienâ* is the right styled *superficies*. *Superficies.* Whatever was the precise nature of the services implied in this right, it gave to a party, not an entire right of disposing of the subject, but merely a right of detaching certain parts of the subject, such as a right to the *vesture*. In English law it has been held that one person may have a freehold in the soil and another in the *vesture*: in the right of cutting grass, for instance, on the land, and that each had a freehold, and could maintain a trespass. The right to the *superficies* concurring with the right in the proprietor is one of the many cases of *condominium* or joint ownership, and cannot with any propriety be deemed *jus in re alienâ*. And here I may remark the inconsistency of those who include improper servitudes with servitudes proper, without including *superficies* among them. For an improper servitude, like *superficies*, gives a right of indefinite user, and may be a right of unlimited duration.

The last of these rights is the right of a creditor by virtue of a pledge or mortgage. The creditor has a double right: he has *jus in personam* in respect of the rights secured to him by the pledge; *jus in rem* in the subject pledged or mortgaged as a security. For against any possible possessor, whether by alienation from the pledger or mortgagor, or as adverse possessor, the pledgee or mortgagee may make his right over the subject good or available. Hence *pignus* or *hypotheca* in Roman law is often called *obligatio rei*; the thing itself is said to be obliged. This means that the right follows the thing into the hands of any party who by any means whatever may take it. The name answers to *lien*. And here the matter thickens: for the obliged thing may itself be *jus in re alienâ*: as, for example, a personal servitude granted out of the dominion of another may itself be the subject of a mortgage, and thus the *jus in rem* of the mortgagee would be *jus in re alienâ* over a subject which is itself *jus in re alienâ*.

The jus in rem of the creditor in a thing pledged or mortgaged.

There is a considerable difference between the right of the pledgee and mortgagee in English and in Roman law. In Roman

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law, the right of the pledgee or mortgagee is merely a right to alien the obliged thing in case his debt is not duly satisfied, and to repay from the proceeds of the sale his debt with the interest and all incidental costs. In English law the pledge or mortgage gives a property to the creditor in the pledged thing if the debt is not paid at the appointed time. But in English equity as opposed to law, the pledged thing is still considered the property of the pledger; he has an *equity of redemption*. The pledge is considered much as it is by the Roman law—as a mere lien. But there is this difference: in English law the creditor by foreclosure may completely acquire a property in the mortgaged thing: in the Roman law he could not; he could only alien the thing, repay himself, and hand over the residue of the proceeds to the mortgager. The right of the pledgee or mortgagee was much like the right which would be acquired in our own law by a mortgage with a power of sale, provided the mortgage could not foreclose.⁸² In the Roman law the creditor could not acquire property in the subject.

Remarks
on the
term '*jura*
in re
aliena,'
sometimes
called *jura*
in re, or
jura.

Before I conclude I will remark, that *jura in re aliena* are sometimes called *jura in re*, and sometimes *jura* simply. As I have stated in my tables, the phrase *jura in re* is often used by modern Civilians as synonymous with *jura in rem* or *dominia* in the largest acceptation; that is, rights which avail against the world at large. But that is a misconception of the meaning of the term as used by the Roman lawyers.

'*Droits réels*' is ambiguous, as sometimes denoting *jura in rem*, and sometimes *jura in re* (*sensu stricto*). This arises from the extension of *jus in re* to *dominia*, and of *jus ad rem* to *obligationes* or *jura in personam*.

Difficulty: Where a thing is subject to a series of rights, —is subject to a series of vested rights (descendible perhaps from present vestees), or to contingent rights to *determinate* parties, existing or not.

But the right of the occupant is not even inchoate. There is no specifically determinate party (existing or not) to take the right. It is nothing but a right that may accrue to everybody capable of taking, who may occupy.

Rights of
which it is
difficult to
fix the
class.

There are certain rights whose class it is not very easy to determine, such, for instance, as an advowson. It is a right not

⁸² Such is now the position in England of a judgment creditor who has sued out a writ of *elegit*, which has been returned and registered in pursuance of the statute 27 & 28 Vict. c. 112, except that he still requires the authority of the Court of Chancery before actually selling.—R. C.

importing any right of user, but only of designating or naming the party who shall enjoy or exercise a certain right. But still it is a *jus in rem*; for it may be disturbed by persons generally, and might be asserted by an action.⁸³ It is like many rights to personal franchises.

Quære. Right of disposition without right of user.

Power of appointing without power of enjoying. See Blackstone, vol. iii. p. 243.

If coupled with a right to enjoy the subject, a power of appointment is in reality tantamount to a power of aliening, generally or partially. If of appointing to any object whatever absolutely, it renders the limited interest to which it is attached absolute property.

[Observe that a right of disposition does not necessarily suppose a right of user: And that an unlimited right of user by way of consumption, supposes no right of disposition.

A limitation of user, as well as of disposition, is, however, necessarily supposed, wherever there is a *vested* right in another; since the last would otherwise be nugatory].—*Marginal Note.*

A right to personal tithes, is not a servitude. So far as it amounts to *jus in rem*, it is a right without a specific subject: analogous to a right in a monopoly; a right in an office; a right to a toll; a right to jurisdiction, etc. The right in each particular case to exact the tithe, is *jus in personam* arising from a quasi-contract; like right to possession against a possessor *bonâ fide*.

[Tithe is a *Servitus* combined with an obligation (s. a.) on the occupant: A right to a part of the produce of the subject *adversus quencunque*, with an obligation on the actual occupant to set out, etc.—*Marginal Note.* Blackstone, vol. iii. p. 89.]

Analogous also to the case of right in a servant;—my right against him is *jus in personam*; but my right against the rest of the world, *in rem*.

Quære. Whether prædial tithe be a servitude? And, if so, whether real or personal? It is attached to an office.⁸⁴

NOTE.

ON THE LAND CONTRACTS OF THE MIDDLE AGES, AND THE ORIGIN OF THE WORD FEUDUM.

The tenure which, in the Latin of the eleventh century, assumed the name of *Feudum*, was modelled in part upon the tenure *Precario* (so called

⁸³ *E.g.* Against the ordinary, and authorities amongst servitudes. Another right in the law of Scotland, invariably collated to the benefice in derogation of the rights of the patron.—Bishop of Exeter et al. v. Marshall, March 3, 1868, L. R. 3 House of Lords App. 17.—R. C.

⁸⁴ Teind (or tithe in Scotland) is to be ground at the dominant mill.—R. C. ranked by Stair and other Scotch legal

LECT. LII from *preco* because the grant was made on the petition of the tenant), and in part upon the *Emphyteusis* of the later Roman law.

In the eighth and ninth centuries, and possibly still earlier (*Marculfi Formula*, apud Baluze), *precarium* found favour with the lords (probably lay as well as churchmen, although we know most about the latter owing to the more careful preservation of their documents), doubtless because it gave the tenant *possession* availing against all *except the grantor* (Dig. xliii. 26, 'De precario'), and gave a disseisor of the grantee no title at all. But it gave the heir of the grantee not even a possessory title. (Dig. 'De precario,' l. 12, § 1. cf. l. 4, § 1.)

Possibly for this last reason, certainly in fact, the contract of *Emphyteusis* became commonly grafted upon the *Precarium* (Muratori, *Antiq. Med. Ævi*, diss. xxxvi.). *Emphyteusis* had, moreover, the advantage, looking from the part of the lord, of imparting to the *personal* obligation annexed to the grant a character of greater legal weight than the mere promise or offer contained in the prayer for the possession *precario*. It was also conveniently elastic. 'Talis contractus quia inter veteres dubitabatur, et a quibusdam locatio, a quibusdam venditio existimabatur, lex Zenoniana lata est, quæ emphyteuseos contractus propriam statuit naturam, neque ad locationem neque ad venditionem inclinantem, sed *suis pactionibus fulciendam*.' (Inst. iii. 24, § 3.)

Combining with the *precarium* the elastic form of the *emphyteusis*, it is easy to conceive how the contract so moulded was ready to incorporate whatever amongst local usages and tenures, German, French, or Celtic, would be likely to bring money into the exchequer of the lordly clients of the conveyancers who adopted the model. So far the explanation is simple. Although we should not imagine that these feudal lawyers had much originality of invention, they may be credited with a certain combination of subtlety and learning, including some acquaintance with the Institutes and Imperial Constitutions of Justinian.

But the appearance of the word *feudum* is more difficult to account for. Muratori (*Antiq. Med. Ævi*, vol. i. p. 575), with a critical judgment rare in his time (1734), denies that it occurs in any genuine document earlier than the eleventh century, and challenges proof to the contrary. Proof does not appear to have been forthcoming, and Robertson (*Hist. of Charles V.*, Proofs, p. 269) mentions that a charter of King Robert of France (A.D. 1008) is the earliest deed in which he has met with the word *feudum*. It must, therefore, be *latinised vernacular* and *not corrupted Latin*.

Much ingenuity has been spent upon accounting for this word. Several have hit upon the idea of connecting it with some root of which *pecus*, *pecunia*, &c., are the Latin derivatives (Spelman, *Gloss. voce* 'Feudum'; Robertson, *Hist. of Charles V.*, Proofs, p. 269; Jamieson's *Scottish Dictionary*, voce 'feu'; Guizot, *Hist. of Civilisation*). But they have attempted the connection through Anglo-Saxon or German roots, which have to encounter the difficulties, 1st, of the late introduction of *feus* into England; and, 2ndly (the objection of Palgrave), that the German name for land of feudal tenure is not any word akin to *feu*, &c. but *DAS LEHEN*.

While looking for light upon the subject, a friend has drawn my attention to the article, voce 'Fio,' in the Etymological Dictionary of Romance Languages by Diez. (*Wörterbuch der romanischen Sprachen*, von Friedrich Diez: Bonn, 1853; and transl. and ed. by Donkin. London: Williams and Norgate, 1864.) I here give an abstract:—

'Fio, Ital.; Provençal, old Catalan, FEU (hence old Portug. FEU): French

FIEF (from the old FIEU), [German translation, Lehngut, Lehnzins]: verb, French FIEFFER (from the old FIEVER), Provençal AFFEUAR [zu Lehen geben]. The Romance words immediately accord with the Lombardian FIU in FADERFIU-M [väterliches Gut], the old High German FIHU, FEHU [Vieh], the Gothic FAIHU [Vermögen], the old Friesland FIA in both senses [Vieh and Vermögen]. Here Donkin suggests *pecus*, and I may add *pecunia*. The H was dropped, the short E in FEHU became the diphthong IE (as the Provençal *mien* from the Latin *meus*), and the Provençal U sharpened into the French F (as the French JUIF from Provençal JUDEU), which F also strongly asserts itself in FIEFFER (comp. ENSUIFER and ENSUIVER). In the Sicil., FEGU (as usual) substitutes G for H. From FIU, FEU, came an important word of middle-age Latin, which appeared about the ninth century in the form FEUDUM, FEODUM, the D being inserted for euphony, as in LADICO for LAICO, &c.'

This seems conclusive. It avoids the objection of Palgrave, and, moreover, it accords with certain historical indications of the system having been matured amongst Longobard lawyers. (Spelman, *ut supra*; Erskine, *Institute of the Law of Scotland*, b. ii. tit. iii. § 6.) It also accounts for all the set of words, Fief, Feoffment, Feu, Infeft, and Fee.

There remains, however, still a word to say about *Emphyteusis*. The idea of its identity with *feu*, *fio*, &c., is not merely the invention of our own age. It belongs to the period of transformation itself, and possibly tended in some measure to aid the assimilating power of the contract so moulded by these mediæval lawyers.

I will cite a curious example from the collection of Muratori, to which I have referred. (*Antiq. Med. Ævi*, vol. i. p. 15.) The descriptive heading given by him is 'Charta permutationis inter Ingonem Episcopum Mutinensem et Bonifacium Ducem et Marchionem Tusciæ atque Rechildam ejus uxorem in qua conjuges Episcopo donant Castra et Curtes Bajoariæ et Fossati Regis, Episcopus vero eis concedit in emphyteusim Castra et Curtes Clagnani et Saviniana. Anno 1033.' The conveyance on the part of the bishop after mentioning the parcels, and the destination to the duke and wife and the survivor and the heirs of their bodies, proceeds as follows:—*'habendum tradidi precaria atque ENFIOTHECARIA nomine . . .'*

The witnesses to the bishop's signature are two lawyers, one described as *legem viventis Longobardorum*, and the other as *legem viventis Romana*. Doubtless these lawyers had settled the draft, and between them coined, or borrowed from others of their craft, the strange word ENFIOTHECARIA. The word speaks for itself of the association in the minds of the authors.

It only remained to systematise the consequences of this threefold combination: viz. the *precarium*, the *emphyteusis*, and the various incorporated tenures. This was a task exactly suited to the capacities of these mediæval lawyers, Longobard and others, and by the time of the appearance of the *libri feudorum*—(whether in the twelfth century or later)—that had been fairly accomplished. The traces of all three sources long remained in the feudal law. The necessity of new investiture of the heir was a consequence of the *precarium*, the forfeiture *ob non solutum canonem*, of the *emphyteusis*, the fealty, homage, &c., of the particular usages of the various societies who adopted the contract.—R. C.

LECTURE LIII.

ON PRESENT OR VESTED, AND FUTURE OR CONTINGENT RIGHTS.

LECT. LIII

A present
or vested
right,
what.

IN this evening's discourse, I shall consider the distinction between vested and contingent rights.

In order to the existence of a right, the two following (amongst other) essentials must concur:—1st. A determinate person or persons, presently existing, in whom the right resides. 2ndly. That the title, mode of acquisition, or investitive fact, to which the law annexes the right, be presently consummate or complete.

Hence it follows, that the epithet 'present' or 'vested,' as applied to a right, is superfluous or tautological. Every right, properly so called, is of necessity present or vested: that is to say, it presently resides in, or is presently vested in, a present and determinate party, through the title, or investitive fact, to which the law annexes it as a legal consequence or effect.

When we oppose a vested or present, to a future or contingent right, we are not, I apprehend, opposing a *right* of one class to a *right* of another class, but we are rather opposing a right to the *chance* or *possibility* of a right. Accordingly, the contingent right of the apparent or presumptive heir to rights which the party presently entitled may alien from him, is frequently styled, not a *right*, but *spes successionis*: that is to say, the chance or possibility that the heir, who has not presently a right, may hereafter acquire one. And, generally, a contingent right is frequently styled '*spes*; *spes incerta*; *Hoffnungsrecht*' or hope-right: a present *chance*, or a present *possibility*, that a *right* may hereafter arise, and may vest in a person in being, or hereafter to be. When, then, in compliance with custom, I use the expressions '*vested* and *contingent* rights,' I am not opposing *rights* of a class to *rights* of another class, but *rights* to *chances* or *possibilities* of rights.

And here I would advert to a meaning, frequently annexed to the expression '*vested rights*,' which is mentioned in Mr. Lewis's⁸⁵ treatise '*On the Use and Abuse of Political Terms*.'

When it is said that the legislature ought not to deprive parties of their '*vested rights*,' all that is meant is this: that the rights styled '*vested*' are *sacred* or *inviolable*, or are such as the parties ought not to be deprived of by the legislature. Like a thousand other propositions, which sound speciously to the ear,

⁸⁵ Since Sir George Cornewall Lewis. He was a member of Mr. Austin's class.

it is either purely identical and tells us nothing, or begs the question in issue. LECT. LIII

If it mean that there are no cases in which the rights of parties are not to yield to considerations of expediency, the proposition is manifestly false, and conflicts with the practice of every legislature on earth. In every case, for example, in which a road or canal is run by authority of parliament through the lands of private persons, the rights, or *vested* rights, of the private owners are partially abolished by the legislature. They are compelled to yield up a portion of their rights of exclusion, and to receive compensation agreeably to the provisions of the Act.

When the expression 'vested right' is used on such occasions, it means one or another of two things:—1st, That the right in question ought not to be interfered with by the legislature; which (as I have remarked already) begs the question at issue; or, 2ndly, That, in interfering with rights, the legislature ought to tread with the greatest possible caution, and ought not to abolish them without a great and manifest preponderance of general utility. And, it may be added, the proposition, as thus understood, is just as applicable to *contingent* rights, or to chances or possibilities of rights, as to vested rights, or rights properly so called. To deprive a man of an expectancy, without a manifest preponderance of general utility, were just as pernicious as to deprive him of a right without the same reason to justify the measure.

Mr. Lewis has suggested that this use of the expression 'vested rights' might be borrowed from the cases in which, under certain rights, considerable capital has been invested or embarked by parties, and the privation of the right would be followed by great disappointment. And this phrase, I think, is usually employed emphatically to cases in which the abolition of the right would be followed by an extraordinary degree of disappointment.

Before I proceed to contingent rights, or to chances or possibilities of rights, I must remark that vested rights or rights properly so called, are divisible into two classes:—1st. Present or vested rights which are coupled with a present right to enjoyment or exercise: 2ndly. Present or vested rights which are *not* coupled with a right to present enjoyment or exercise.

For example: If I am absolute owner of land or a movable, not subject to a right in another of limited duration, I have not only a present right to or in the subject, but also a right to the present possession of it: that is to say, a present right to enjoy or exercise my present right of ownership.

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But if the subject be let to another, I have a present right of ownership without a present right to *exercise* my right of ownership: I have merely a reversion, expectant on the determination of the lease, and which, till the lease determine, cannot take effect in possession.

Or if a legacy be given to an infant, but with a direction in the will that the legacy shall not be paid to him till he come of age, he has a present or perfect right to the legacy, although he cannot touch it before he shall become adult. For if he should die before he come of age, the legacy would not lapse (or the gift would not be inoperative), but the legacy would pass to the successors of the legatee, and not to those of the testator. It is not a gift *conditioned* to take effect *in case* the infant shall come of age, but an *absolute* gift with a direction suspending the payment to him until he shall come of age. If he should die before he come of age his successors would be entitled to present payment as well as to a present right in the subject of the bequest.⁸⁶

A right, therefore, may be present or vested, although the right to enjoy it, or exercise it, be contingent or uncertain. Or, in other words, a present and certain right to possession is not of the essence of a present and certain right.

For example: In the case of the legacy, to which I have just adverted, it is presently uncertain whether the infant will ever be entitled to the payment: but still he has a present right to the subject of the bequest, inasmuch as the right would pass to his successors though he himself were to die before the period fixed for payment.

Again: In every case of a vested right, expectant on the determination of a preceding right, the right of the expectant to possession or enjoyment is necessarily uncertain. For, though he has a present or perfect right, to take effect in possession on the determination of the preceding right, he may die himself (or even die without representatives capable of enjoying the expectancy), before the preceding right shall come to an end. Of this sort is every vested remainder for life, or in tail. The remainderman for life may die, or the remainderman in tail may die without issue in tail,⁸⁷ before the remainder has taken effect in possession.

The distinction which I have tried to explain ought to be carefully marked. For it is often supposed, even by writers who

⁸⁶ Blackstone, vol. ii. p. 513.

⁸⁷ And it should, perhaps, be added, without having (by attaining twenty-one) acquired the capacity of executing

a disentailing deed (or, according to the old forms, of suffering a recovery).—R. C.

commonly perceive the distinction between vested and contingent rights, that a right to present enjoyment is of the essence of a present right: or, what comes to the same thing, that a right of which the enjoyment or exercise is uncertain is necessarily an uncertain or contingent right.

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[Examples:—Blackstone, vol. ii. p. 163. ‘Of estates in *possession* whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, &c.’ as if a right not in possession might not be coupled with a present interest.]

I have said already, that in order to the existence of a *present* right, or in order to the existence of a right properly so called, the two following (amongst other) essentials, must concur:—1st. A determinate person or persons, presently existing, in whom the right resides, or in whom it is vested. 2ndly. That the title, mode of acquisition, or *causa*, to which the right is annexed as a legal consequence or effect, be presently consummate or complete.

A future or contingent right, what.

Hence it follows, that a right is contingent in either of the following cases:—

1st. The right is contingent, if the person to whom it is destined or determined (or in whom it is to reside or vest), be not presently existing. In this case it is supposed that the events constituting the title whereon the right is to arise have already happened wholly or in part: but that though the title be presently consummate, the right nevertheless is presently contingent, inasmuch as the person to whom it is determined may never exist to take it.

2ndly. The right is contingent, if the person to whom it is determined be presently existing, but the title, or mode of acquisition, whereon it is to vest in that person, be not presently consummate, and never may be.

In this last case, it is necessarily supposed that the title is complex (or consists of two or more successive events): that one or more of those events has already happened: but that one or more of those events has not yet happened, and may never happen.

For example: If land be now given by deed or will to A for his life, and after A's death to the eldest son (now unborn) of B, in tail or in fee, the right which is determined by the gift to the unborn son of B is contingent. By the gift itself the title is presently complete: for if B had now a son, the estate in tail or in fee would now be vested in him, although his right

LECT. LIII { to possession, or to the enjoyment or exercise of his right, would not begin till after the determination of A's estate for life. But though the title is presently consummate, the right nevertheless is presently contingent: for it is presently uncertain whether B will have a son, and whether the person to whom the right is determined will ever exist.

Again: If land be given to A for his life, and, in case B (a person now existing) shall survive A, to B in fee, the right which is determined by the gift to B and his heirs general, is presently a contingent right. For though the person to whom it is determined is now in existence and capable of taking it, the title, or mode of acquisition, whereon the right is to arise, is presently inchoate only, and perhaps will never be consummate. By the gift to B, in case he shall survive A, a part only of the complex title has presently happened. Before it can be consummate, and the right determined to B can vest or come into existence, A must die, leaving B surviving him: which event, forming a part of the entire complex title, has not yet occurred: and possibly may never occur.⁸⁸

Wherever, therefore, the person to whom the right is determined is not presently in being, or wherever the title is presently inchoate, and its consummation is presently uncertain, the right is contingent: that is to say, there is not properly a *right* (residing, as a right must do, in a present person or persons), but a present *chance* or *possibility* that a right may arise hereafter, and may reside in the person or persons, existing or to exist, to whom it is determined or destined.

The two grounds of uncertainty to which I now have adverted may happen to exist together in one and the same case: that is to say, the person to whom the right is determined may not be yet in being, and the title determining the right to the person may yet be merely inchoate, and its consummation contingent. Insomuch that the right would be presently contingent, although the party were presently existing.

For example: If an estate were given to the eldest son of B (B having presently no son), on condition of B or his son doing some given act, the right would be contingent in two ways. For it is uncertain whether the person to whom the right is determined will ever exist. And though the person presently existed, the deed or performance, which is a part of the entire title, would be contingent. Until B have a son, and B or his son do the given act, there is no right properly so

⁸⁸ Blackstone, vol. ii. pp. 169, 170.

called, but a mere chance or possibility that a right may arise and vest in a given party.

As a further example of contingent rights, I may mention the *spes successionis* which resides in the *presumptive* or *apparent* heir: meaning, for the present, by the heir, the person who takes from the *dominus*, or absolute owner, in the way of succession *ab intestato*.⁸⁹

Strictly speaking, the apparent or presumptive heir is not heir. For *nemo est hæres viventis*. In order to the existence of the relation between the predecessor and the successor, the predecessor, in the case of heirship, must have died: that is to say, must have died physically, or must have died civilly. By the apparent heir, we mean the person who would be heir presently if the party, to whom he is heir apparent, presently died intestate. By the presumptive heir, we mean the person who would be heir presently, if the party presently died intestate, and no person entitled to take as heir in preference to the presumptive heir came into existence before the decease.

Now it is manifest that the right of the apparent heir is a contingent or uncertain right. Before he can acquire as heir properly so called, he must not only survive the party to whom he is heir apparent, but that party must die *intestate*; and, in case the subject of the uncertain succession be some single right, and not the university or aggregate of the party's rights, that party must also die without having aliened the right in his lifetime.

The right of the presumptive heir is more uncertain still. For before he can acquire as heir properly so called, the party to whom he is heir presumptive must die in his own lifetime; the party also must die intestate, or intestate and without having aliened the right by act *inter vivos*; and no party entitled to the heritage in preference to the presumptive heir must come into being, between the time present and the happening of all those other contingencies.

Such is the influence of words over the understanding, that I thought, at first, the right in question was not a contingent right: that it was a present or vested right liable to end on certain contingencies; that is to say, the death of the so-called heir before the decease of the party to whom he is presently heir (apparent or presumptive); alienation by the party in the way of will or otherwise; and so on.

But this difficulty arose from the name which is improperly

⁸⁹ Blackstone, vol. iii. p. 224. Mackeldey, vol. i. p. 217. Mühl. vol. i. p. 146.

Lect. LIII given to the apparent or presumptive heir. In truth he is not heir: for *nemo est hæres viventis*. He is merely the person who will be heir in case certain contingencies shall conspire to cast the heritage upon him. He has not a present or perfect right; but he has merely an inchoate right which *may* become consummate, in case certain facts necessary to the completion of his rights shall arise hereafter in his favour. And, accordingly, his so-called right is commonly called *spes successionis*: that is to say, not a *right*, but a chance or possibility that he may acquire a right.

The test, then, of a *vested* right (or of a *right* as opposed to a *contingent* right, or to the *chance* or *possibility* of a right) is, I apprehend, this:—

If the right be perfectly acquired, or if the whole series of facts necessary to its existence have already happened, the right is *present* or *vested*, or (in other words) *is* a right.

If the right be not perfectly acquired, or if that whole series of facts be presently incomplete and may never become consummate, the right is *contingent* or *uncertain*, or is rather a *chance* or *possibility* that a right may hereafter arise.

And in order to the perfect acquisition of the right, or to the completion of the series of facts whereon the right arises, two things must conspire.

1st. The title to which it is annexed must be consummate: that is to say, the fact (or the whole series of facts), constituting the title, must have happened already.

2ndly. The person to whom it is determined by the title must have come into existence, and must actually be entitled to the right, or (if he have died, and the right be transmissible) must have transmitted it to his own successors.

If the title be not consummate, or if part of it consist of a contingency or of a fact which may never happen, the right is presently contingent. And though the title be consummate, the right also is presently contingent, in case the title determine it to a person who is not yet in existence. For, to the being of a perfect right, the existence of a person in whom it resides is not less requisite, than the consummation of the title by which the right is vested in him.

I apprehend that a right is contingent, in case the title be incomplete and may never become consummate, although the completion of the title depend upon the will of a present party to whom the title determines the right. This, for example, is the case, in the Roman Law, where a party dies intestate, but

the heritage is not cast on the apparent or presumptive heir *ipso jure*: that is to say, where the heir, in order to the completion of his title, or in order that he may become heir perfectly and truly, must *adire hæreditatem*, or accept the heritage.

Until he accept the heritage, he has a right deferred or proffered by the law (*jus delatum*), but he has not a right fully acquired (*jus acquisitum*): so that if he repudiate the inheritance, it passes over to a party who takes as heir to the intestate, and not through the party to whom the heirship has been merely proffered. In this case, the party who has *jus delatum* has merely a contingent right, although the happening of the contingency necessary to the consummation of his title, depends upon his own will.

The same may be said of the right of the heir (according to the law of England), who has not completed his title, upon the death of the ancestor, by doing some act which amounts to *seisin*: that is to say, taking possession (physically or constructively) of the land which has descended from the ancestor. The ancestor being dead, intestate and without otherwise aliening, the heir has *jus delatum* (to borrow the language of the Roman Law), which he may turn into *jus acquisitum* by an act of his own; that is to say, by taking *seisin* or possession of the subject. But, until he fully acquire by *seisin* or possession, he has not a present or vested, but merely a contingent, right. Insomuch that if he die before *seisin*, the land will not descend through him, but will descend to some party who acquires as immediate successor to the predeceased ancestor.⁹⁰

The same may be said of parties who are *entitled* to probate or to take out letters of administration. By virtue of the will, or of the relation wherein they stand to the deceased, they have *jus delatum*: which, by proving the will, or by taking out administration, they may convert into *jus acquisitum*. But they are not *ipso jure* representatives of the deceased; and must do a contingent act, depending on their own will, before their inchoate right can become consummate.

If, then, a right be determined to a party who may never come into existence, or if the title be incomplete, and may never be consummate, the right is contingent: that is to say, it is presently uncertain whether the right will ever arise. And

⁹⁰ Under the rules of succession now obtaining (under the Acts 3 & 4 Will. IV. c. 106, and 22 & 23 Vict. c. 35, § 19, 20), the question who was 'the person last seized' has become of no importance; the descent being traced from the last purchaser (or person who acquired right otherwise than by title of descent). —R. C.

LECT. LIII this is the only mark of a contingent right which I have been able to discover.

Mr. Fearne, in his beautiful essay 'On Contingent Remainders and Executory Devises,' lays down the following, as the invariable test by which a vested remainder is distinguished from a contingent one. 'It is not the uncertainty of ever taking effect in possession, that makes a remainder contingent. The present capacity of taking effect in possession, if the possession were now to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.'⁹¹

Now I cannot help thinking that this test of a vested remainder is fallacious.

For we may imagine a *contingent* remainder which is presently capable of taking effect in possession, in case the preceding estate were presently to end.

For example: If land be given to A for life, and, in case B survive A, to B in fee, B has a contingent remainder: For it is uncertain whether B will survive A. And yet the estate of B, so long as B lives, is presently capable of taking effect in possession, in case A's estate presently determined.⁹² For if A were now to die, leaving B him surviving, B's estate would not only become vested by the happening of the given contingency, but by the happening of the same event would also take effect in possession: that is to say, B would become entitled to a present or perfect right coupled with a right to present enjoyment or exercise.

The present capacity of taking effect in possession, if the possession were now to become vacant, will not then distinguish a vested from a contingent remainder: inasmuch as there are contingent as well as vested remainders to which that same capacity is incident.

But whether Mr. Fearne's test be or be not a test of a vested *remainder*, it certainly will not distinguish vested rights *generally* from contingent rights *generally*. For, by our own law, and other systems of law, there are numberless present

⁹¹ Fearne, p. 216.

⁹² Only if A's estate determined by death. But if A's estate determined by forfeiture in his lifetime, B also living, B's estate could not immediately take effect in possession, because the contingency would not have determined. So that Mr. Fearne's rule (which, of course, is meant to apply only to the estates

known to English law) holds good in this instance. I have little doubt that the author, could he have revised this lecture, would have restricted his criticism of Mr. Fearne to the observation that his rule applies only to the technicalities of English law, and expresses no principle applicable to general jurisprudence.—R. C.

rights, and numberless contingent or uncertain rights, which are not vested or contingent remainders, and have little or no resemblance to them. LECT. LIII

In the case, for example, of a specific legacy given to an infant absolutely, but with a direction that the payment shall be deferred till the infant come of age, the test can have no application. There, the right of the legatee is a present right, and cannot take effect in possession till he come of age. But there can be no question about its present capacity of taking effect in possession. For there is no preceding interest on which it is expectant, and on the determination of which the enjoyment is to commence. The absolute ownership is now in the infant, and yet the infant cannot enjoy until the arrival of the period fixed by the will.

The only marks of a contingent right which I have been able to discover are those which I have endeavoured to explain.

1st. Although the facts constituting the title have all of them happened (or, more briefly, although the title be consummate), the right is a contingent or uncertain right, if it be determined to a party who may never come into existence.

2ndly. Although that party be in existence, the right nevertheless is a contingent right, if the title be not consummate, and may never be completed.

And here I would remark, that a contingent right, or a chance or a possibility of a right, may be transmissible to the heirs or representatives of the party to whom the right is determined. It may, indeed, happen that the existence of the party, at a given time, may be the very contingency, or parcel of the very contingency, on which the right is to arise. And, on that supposition, if the party die before the given time, the contingent right can never vest, and there is no possibility *transmissible* to his representatives.

For example: If land be given to A for life, and in case B survive A, to B and his heirs, if B die before A, the contingent right can never vest.

But if the existence of the party at a given time be not parcel of the contingency, the contingent right (if it be calculated to endure beyond the party's life) may devolve to his representatives.

For example: If land be given to A for life, and, in case B survive A, to B and his heirs, B has a contingent right transmissible to his representatives. The contingency on which the right is to arise is the death of A, leaving C surviving. And if

Lect. LIII B die before the contingency happens, the chance or possibility still exists, and may pass from B himself to the heirs or representatives of B.

No rights
can be
future
without
being con-
tingent.

I thought at first that there were cases in which a right is future and yet not contingent, but in all those cases the right is present, and only the time of enjoyment is future. For example, by what is falsely called an executory devise, an estate is given *in futuro* on the happening of an event which is certain. A party devises land to trustees for a given number of years for certain purposes, and from and after (say) twenty years to A and his heirs. The right which is to take effect in possession after twenty years is not contingent, for the twenty years will certainly expire, and the right will certainly go to A and his heirs after that period. Or if I devise land to A and his heirs after twenty years, leaving it to my own representatives till that time, the right of A and his heirs has nothing of the properties of a contingent right, except that it is to take effect *in futuro*. It is a present right, of which the enjoyment is presently postponed. It is something analogous to a vested remainder. When an estate is granted to one person for life or years, with remainder to another, the remainder is a vested remainder, though the enjoyment is postponed to the lapse of the period. It is not a right to come into existence at the end of the period, but a present right, then to take effect in possession.

There are two senses wherein a right may be styled *contingent*: one of which senses is large and vague; the other, more strict and definite.

In the large and vague sense, *any* right to which *any* body (now in being or hereafter to be) may *any* how become entitled, is a contingent right. It is possible, for example, that I or you, or any body now in being or hereafter to be, may become owner or proprietor of A's house, or, more generally still, of any house whatever.

But when we oppose a *contingent* right to a *present* or *vested* right, we commonly mean by a 'contingent right' a specifically determined right: and we commonly mean moreover that the right is inchoate, although the right is not consummate, and although its consummation be uncertain. A contingent right is a determinate right of which the title is inchoate, or an indeterminate right of which the title is not even inchoate (unless in so far as capacity to take be a commencement).

The contingent rights which are subjects of legal rules, are those which are inchoate: *i.e.* the title to which has begun, although (being a complex title, or consisting of several incidents) it is not consummate, and never may be: *i.e.* some of the incidents necessary to complete it have not happened.

The right also must be determinate: *i.e.* the inchoate title must not consist in a mere general capacity to take rights, or rights of a given class: *e.g.* The right of the presumptive or apparent heir is a contingent right determinate and inchoate.

The mere capacity of taking an estate in fee simple is not a title to any determinate right.

The mere capacity of husband is also distinguishable from that of heir. It is a capacity to take his share of any rights to which the wife may become entitled. But that of the heir is an inchoate and determinate right: *i.e.* the party stands in a *relation* to the deceased which forms part of the title, and the right itself is a right to a given *res singula* or to a given *universitas*.

Sometimes, however, we speak of contingent rights in the larger and vaguer meaning. For example: The contingent rights embraced by the *spes successionis*, are any contingent rights to which the heir will become entitled on the death of the predecessor. Again, there is a provision in the Roman Law by which a party may mortgage all his future acquisitions; all of which are in *that* case treated as contingent rights, though of course many of them are not specifically determined to him at the time of the mortgage.

In considering the distinction between present and contingent rights, I have considered it as abstracted from all the peculiarities of the English Law. To expound the distinction as concrete in those peculiarities, with vested remainders, contingent remainders, executory devises, conditional limitations, etc., and all these implicated with distinctions between law and equity, and real and personal property, would take volumes.

Many of these distinctions are perfectly arbitrary, being dependent on peculiarities of tenure now exploded; on feoffment, for example, and livery of seisin. There is no part of the field of law where the possibility of pruning it down within a much smaller compass may be more triumphantly shewn. There is no case in which so little is accomplished by such complex machinery.

In treating of vested and contingent rights, I have confined my

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remarks to *jura in rem*, or to rights which avail against the world at large. But distinctions resembling those to which I have just adverted also obtain between rights of the opposite class.

Every *jus in personam*, or which avails exclusively against a person or persons determinate, is a right to an act or forbearance. But the act to be done, or the forbearance to be observed, may be to be done, or to be observed, either certainly, or on the happening of a given contingency. If it be to be done certainly, the right may be deemed *vested*. If it be to be done on a condition, or on the happening of a contingency, the right may be deemed contingent.

And if it be to be done certainly, it may be to be done presently (or on the demand of the obligee), or it may be to be done at a determinate future time. In the first of which cases, the right may be deemed a present right, coupled with a right to immediate fulfilment. And in the last of which cases, the right may be deemed a present right, of which the fulfilment is presently postponed.

A right (vested or contingent) may be liable to end before the lapse of its possible duration.

First, as to vested rights.

(a. 1.) Where the right is a right of limited and defined possible duration, it may be made liable to end, on happening of a given contingent event, before the lapse of the defined period for which it is calculated to endure. (See Blackstone, vol. ii. p. 143.)

(a. 2.) Where the right is a right of limited but indefinite possible duration, it may be made to end, on happening of a given contingent event, before happening of certain facts up to which it is calculated to endure. (See Blackstone, vol. ii. p. 121.)

(b.) Where the right is a right of unlimited duration, it also may be made to end, on the happening of a contingent event, before the lapse of its possible duration: *i.e.* to end on *another* given contingency before the contingent failure of the line of successors to whom it is capable of devolving, etc. (See Blackstone, vol. ii. p. 154.)

Secondly, as to contingent rights.

What has been said of a vested, is applicable (with a few modifications) to a contingent right. For it may be made liable to end (*if it should ever vest*) on a given contingency before the lapse of its possible duration.⁹⁸

⁹⁸ Blackstone, vol. ii. ch. 10, 152. Mühlenbruch, vol. i. p. 209. Mackeldey, vol. ii. p. 463.

Rights
subject to
a contin-
gency, or
condition
resolutive.

I shall here remark on the meaning of the term *condition*. Taken as it is generally used, it is nearly synonymous with contingency. It is any uncertain event or contingency on which a right is to commence or to cease. More especially it means some act or forbearance depending on the will of a given party, and to be done or forborne by him as a means of acquiring a given right. I am entitled in a condition, if I shall become entitled on my doing or forbearing something which depends on my own pleasure. This is a very common use of the term in ordinary language, but I do not find it thus restricted in any law book, unless the expression to *fulfil* a condition be an exception.

In the older Roman law there is scarcely anything to be met with about contingent rights. There is scarcely any instance of a disposition suspending the exercise of any right, or by which a right is carried over on a contingency, or is to commence on a contingency. Every disposition on which depends a right to take effect at a future time, seems to have been forbidden absolutely. It was the prætorian law which afterwards introduced substitutions or entails.

NOTES.

The *fidei-commissa* and trust-substitutions of Roman Lawyers are placed with inheritances: for, with them, contingent interests were created by will. Even, therefore, where the subject was a *res singula*, it was considered after testaments.

Contingent interests not allowable by strict Roman Law.⁹⁴

Dispositions suspending vesting, and preventing alienation.

In the case of *usus*, etc., there was no remainder over to a third party (still less an uncertain party on an uncertain event), but a mere reversion in the grantor descendible to his heirs.

[Gaii *Comm.* ii. § 179 to § 274.]

Conditional fees and estates tail to be ranked with substitutions, *fidei-commissa*, etc. To rank them with inheritances (i.e. with rights which devolve agreeably to law in default of a disposition), leads to nothing but confusion. Such an inheritance or fee ought to be considered as a series of life-interests. The language resembles that of the Roman *Fidei-commissa*. (See Mackeldey.)

Various means of limiting inalienability: In the Roman Law, directly: In the English, by fictions. (Blackstone, vol. ii. p. 110.)

⁹⁴ See p. 59, vol. i. *ante*.

LECTURE LIV.

ON TITLES, MODES OF ACQUISITION, OR INVESTITIVE AND
DIVESTITIVE FACTS.

LECT. LIV
 {
 Recapitu-
 lation.
 Primary
 Rights,
 etc. Rights
in rem,
per se.

I HAVE considered primary rights *in rem*, as existing *per se*, or as not combined with rights *in personam*, from various aspects.

I first considered the rights in question as distinguished by differences between their respective *subjects*, or between the aspects of the forbearances which are respectively their *objects*. Addressing myself particularly to such of the rights in question as are rights in or over specifically determined things, I then considered the rights in question as distinguished by differences between the degrees wherein the entitled persons may use or deal with the subjects. In other words, I considered the distinction between *property* or *dominion* (meaning by property or dominion, any right of the class in question which gives to the party entitled an indefinite power of using or dealing with the subject), and *servitus* or easement.

I next considered the rights in question as distinguished by differences between their durations or between the quantities of time during which they are calculated to last.

Having considered the rights in question as distinguished by differences between the degrees wherein the entitled persons may use or deal with the subjects, and having considered the rights in question as distinguished by differences between their durations, I next adverted to a distinction which I found it impossible to explain, until I had treated of the two distinctions to which I have now adverted: namely, the distinction between *jus in re propria*, *absolute property*, property pre-eminently so called, or *dominion sensu stricto*, and those various fractions of absolute property which are comprised by the generic expression *jus in re aliend*.—As I endeavoured to shew, the distinction between *jus in re propria*, or absolute property, and *jus in re aliend*, does not quadrate with the two distinctions to which I have now adverted: namely, the distinction between rights *in rem* in respect of differences between the powers of user severally annexed to them, and the distinction between rights *in rem* in respect of differences between their several durations: for though absolute property is a right of unlimited duration and a right accompanied by a power of indefinite user, certain rights *in re aliend* (as that, for example, of the *emphyteuta*, or

that of the tenant in fee simple), are also rights of unlimited duration, and are accompanied with a power of user which is not susceptible of exact circumscription. LECT. LIV

I lastly considered the rights in question in so far as they are distinguishable into vested and contingent: that is to say, into rights and *chances* or *possibilities* of rights.

And considering the rights in question as being *vested* or *present*, as being *perfectly acquired*, or as being *rights*, I distinguished such as are vested and are accompanied with a right to present enjoyment or exercise, from such as are also vested but are not accompanied with a right to present enjoyment or exercise.

Having considered the rights in question from the various aspects now enumerated, I proceed to consider them in respect of their *titles*: meaning by their titles, the facts or events of which they are legal consequences (or on which, by the dispositions of the law, they arise or come into being), and also the facts or events on which, by the dispositions of the law, they terminate or are extinguished. Introduction to the consideration of Titles, or of Investitive and Divestitive Facts.

In considering *titles*, or investitive and divestitive facts, I shall address myself particularly to titles as engendering or extinguishing rights *in rem* considered *per se*: that is to say, as not combined with rights *in personam*.

Titles as engendering or extinguishing rights *in personam*, and as engendering combinations (simple or complex) of rights *in rem* and rights *in personam*, I shall discuss particularly hereafter.

Title by succession *ab intestato*, and by succession *ex testamento*, I shall also pass over for the present; even in respect of the cases (as, for example, a specific legacy) wherein it engenders a singular or particular right availing against the world at large. For the acquisition of a particular right (or of a *res singula*) by descent or testament, cannot be explained conveniently, unless acquisition by descent or testament of the university or aggregate of the intestate's or testator's rights be also explained at the same time.

Being engaged with the consideration of the Law of Things, I shall also for the present postpone the consideration of titles, in so far as they engender or extinguish *status* or conditions, and in so far as they are in any way implicated with *status* or conditions.

Being engaged with the consideration of primary rights and

duties, I shall also postpone delicts considered as titles, with the titles which arise from delicts in the way of consequences, till I come to treat of the rights and duties which I style sanctioning or secondary.

But though, in considering titles, I shall address myself particularly, for the present, to titles as engendering and extinguishing rights *in rem* considered *per se*, I shall preface my remarks on titles, as engendering and extinguishing the rights in question, by certain remarks which apply to titles generally.

From these remarks, applicable to titles generally, I shall proceed to the leading distinctions between titles as engendering or extinguishing rights of the class in question: though, in considering those leading distinctions, and, indeed, throughout the course of my present disquisition, I shall often be obliged to advert to titles as engendering rights of other classes.

Having made certain remarks applicable to titles generally, and on the leading distinctions between titles as engendering and extinguishing the rights particularly in question, I shall consider *seriatim* certain titles (as engendering and extinguishing (that is) the rights particularly in question), which, in some shape or other, are found in every system, and are therefore appropriate matter for General Jurisprudence. The titles which are peculiar to particular systems or such modifications of the titles common to all systems as are peculiar to particular systems, are foreign to the subject and scope of my Course: And when I mention them, I shall merely advert to them for the purpose of illustration.

Of the titles which I shall thus consider simply and *seriatim*, the following are the principal:

1st. The acquisition of *jus in rem* by *occupancy*: *i.e.* by the apprehension or occupation of a thing which has no owner, with the purpose of acquiring it as one's own. (We might take a thing having already an owner, with the purpose of acquiring it as our own. But in that case the right which we acquire is a different right; that which is called a *right of possession*, a right availing against all the world *except* the owner of the subject.)

2ndly. The acquisition of *jus in rem* by *labour*: *i.e.* by labour expended on a subject which has no previous owner, or even on a subject which has. For there are various cases in which a party acquires a right in a thing belonging to another, by labour employed upon it; for instance, in the Roman Law by *specification*, that is, by giving it a new form.

3rdly. The acquisition of *jus in rem* by *accession*: that is to say, through the medium of a thing of which one is owner already; as in the case of a thing attaching to another, as land washed away and joined to one's own land, or the fruits arising from one's own land.

4thly. The acquisition of *jus in rem* by occupancy or labour combined with accession.

5thly. The various modes of acquiring *jus in rem* which fall under the generic name of *title by alienation*; meaning by alienation, the intentional and voluntary transfer of a right (or of a fraction of a right) by the party in whom the right resides, to another party.

6thly. The acquisition of *jus in rem* by *præscription*: the consideration of which title will involve a previous consideration of the so-called right of possession.

7thly and lastly. Such modes of *losing* rights as are not involved by implication in *modes* of acquiring them. For as *every* mode of acquisition is not derived from a pre-existing title, so may a title end without engendering another. Occupancy, for example, is not a title derived from a previous title: for title by occupancy, strictly and pre-eminently so called, is a title consisting in the apprehension of what was previously no man's, with an intent to make it one's own. And so, where absolute property terminates by the annihilation of its subject, the mode by which the owner loses his right is not at the same time a title to a right in another. Although, then, there are many cases in which a party in acquiring a right deprives another party of a right, there are also many cases in which one right begins when no other right ends, or ends when no other right begins.

In considering the titles to which I have now adverted, I shall commonly assume that the right which is the subject of the acquisition or loss, is absolute property, or dominion strictly so called, over a singular or particular *thing* in the proper acceptation of the name: noting from time to time, as I may see occasion, the effect of the title in question in engendering or extinguishing rights which are not rights of that class or description.

The above is, I think, the way in which titles are commonly treated. It would be possible to arrange rights and titles in a great variety of ways. The basis of the arrangement might even be the titles, or investitive events themselves, and rights might be arranged under them. This arrangement has been

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suggested by Mr. Humphreys. But generally the differences of the kinds of rights are assumed as the basis of the arrangement, and the titles are treated incidentally. The Roman lawyers, for example, first treat of *dominium* and then of *jura in re aliend*. They refer briefly again to these modes of acquisition or loss which they had before treated more amply under *dominium*, inserting any peculiarities arising from the nature of the fractional right engendered or lost. And I am inclined to think that this would be found on trial to be incomparably the best mode of arranging the subject.

LECTURE LV.

THE SUBJECT OF TITLES CONTINUED.

LECT. LV.

Titles con-
sidered
generally.

AGREEABLY to the method or order which I announced in my last Lecture, I shall offer a few remarks applicable to titles in general, before I especially discuss them as engendering or extinguishing the rights to which I have now adverted.

Considered with reference to the modes wherein they respectively begin, or wherein the entitled persons are respectively invested with them, Rights, it appears to me, may be divided into two kinds.

1°. Some are conferred by the law, upon the persons invested with them, through intervening facts to which it annexes them as consequences.

2°. Others are conferred by the law upon the persons invested with them, immediately or directly; that is to say, not through the medium of any fact distinguishable from the law or command which confers or imparts the right.

Taking the term 'title' in a large and loose signification (and also as meaning a fact investing a person with a right), a right of either kind may be said to begin in a title. For, taking the term 'title' with that large and loose signification, it is applicable to *any* fact by which a person is invested with a right: it is applicable to a law or command which confers a right *immediately*, as well as to an intervening fact through which a law or command confers a right *mediately*.

For, though, to some purposes, we oppose *law* and *fact*, a law or other command is of itself a *fact*: And where a law confers a right immediately, the law is the only fact whereon the right arises, and is therefore the *title* (in the large and loose

signification of that expression) by which the person is invested with the right. For example: By a special act of parliament, a monopoly, or a right of vending exclusively commodities of a given class, might be granted to a given person, for his own life, or for a term of years. Now, in this case, the privilege conferred by the special act of parliament might be strictly *personal*: that is to say, limited exclusively to the specifically determined grantee, and not transmissible to the heirs or assigns of the grantee, or to any persons of a given generic description.

And if it were strictly personal, it might be conferred by the act immediately or directly; that is to say, it might not be annexed by the act to any fact distinguishable from the act itself. And in this case, the act would be styled the *title* (in the loose signification of the term) from which the grantee derived the privilege.

But, taking the term 'title' with a narrower and stricter signification, it is not applicable to laws which confer rights *immediately*, but is applicable only to the *mediate* or *intervening* facts *through* which rights are conferred by laws. In respect of this narrower and stricter signification, the rights of the two kinds which I am now considering may be distinguished by the following expressions: A right which is annexed by a law to a mediate or intervening fact, may be said to originate in a *title*: A right which is conferred by a law without the intervention of a fact distinct from the law that confers it, may be said to arise from the law directly or immediately; to arise *ipso jure*; to arise *by operation of law*, or by *mere* operation of law.

'Rights *ex lege immediate*,' 'rights arising *ipso jure*,' or 'rights arising by operation of law,' are terms (as I shall shew hereafter) which are often misapplied. They are often applied to rights (as I shall shew hereafter) which are annexed by the law to *mediate* or *intervening* facts. And the terms as thus applied, or as thus misapplied, denote, not that the rights in question arise from the law *immediately*, but that the facts to which they are annexed are not facts of certain classes, or that they are annexed to certain facts unaccompanied by certain others.

For example: where a title has not acquired a brief generic name, the right is said to arise *ex lege immediate*; that is to say, not from any of certain titles which have acquired such names, but from a title which is opposed to the others by that misexpressive phrase.

And when heirs of certain classes are said in the language

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of the Roman law to acquire the heritage *ipso jure*, it is not intended that they acquire the heritage without the intervention of a title, but that the title through which they acquire does not comprise a certain fact which, in the case of heirs of other classes, is parcel of the mode of acquisition: namely, *aditio hereditatis*, or acceptance of the heritage.

But when I speak of a right arising from the law immediately, arising *ipso jure*, or arising by operation of law, or mere operation of law, I use the phrase with its obvious and proper signification. I mean a right conferred by a law without the intervention of a fact distinguishable from the law that confers it. And I oppose it to a right conferred by a law through a *title*, or through the intervention of a fact which is distinguishable from the law, and to which the law annexes the right as a consequence or effect.

Having tried to suggest the distinction between rights arising from *titles*, and rights arising from laws *immediately* or *directly*, I will advert briefly to the following topics.

I will first advert to the nature of the few, and comparatively unimportant rights, which arise from the law *immediately* (in the proper signification of the phrase): that is to say, *not* through a fact distinguishable from the law by which the right is conferred.

I will then advert to the *functions* of titles: or, in other words, to the reasons for which rights are commonly conferred by laws through titles; and for which facts of certain descriptions are selected to serve as titles, in preference to facts of other descriptions.

The only rights which arise from laws immediately are, I think, of the class of rights which are strictly *personal privileges*.

And here I must remark, that every privilege properly so called is a strictly personal privilege: that is to say, an anomalous right (or an anomalous immunity from duty) which is conferred by a law (also called a privilege) on a specifically determined person (individual or complex), as being that very person. For example: A monopoly granted to Styles, as being the individual Styles, is a strictly personal privilege: It is given to the very individual, as being the very individual, and therefore is not assignable or transmissible to his representatives. A monopoly granted to a corporate body, as being that very body, is also a personal privilege. For it is not exercisable by any but the complex person to whom it is granted specifically.

Rights ex
lege immediate.
diat.

But though every privilege, properly so called, is, as it seems to me, a strictly personal privilege, the term is extended to certain anomalous rights (or to certain anomalous immunities from duty or obligation) which are not conferred on specifically determined persons as being those very persons.

For example: Certain so-called privileges are *privilegia rei*, or privileges conferred on *prædia*: meaning by a *privilegium rei*, or a *privilegium* conferred on a *prædium*, a privilege conferred on its successive owners or occupants as being such owners or occupants.

And of *personal* privileges (or of privileges conferred upon persons as *not* being owners or occupants of specifically determined *prædia*) some are transmissible and assignable to the heirs and alienees of the grantees, and are not exclusively exercisable by the very grantees themselves.

But, strictly speaking, a *privilegium rei* (or a privilege granted to the occupants of a given *prædium*) is not a privilege. It is not granted to the parties as being those very parties, but as being persons of a given class, or as being persons who answer to a given generic description;—as being owners or occupants of the *prædium* or parcel of land, whereon, by an ellipsis, the privilege is said to be conferred.

Though the class of persons entitled in succession is comparatively narrow, the right may be likened to those anomalous rights which are occasionally granted to extensive classes of persons: as, for example, to soldiers, to infants, or to married women. And in these cases although the right, as being anomalous, is styled *singular*, and the law conferring the right is also styled *singular*, neither the anomalous right, nor the anomalous law conferring it, is deemed or styled a privilege.

For though the law and the right are 'exorbitant' or 'eccentric,' although the law and the right are 'singular' or 'inelegant,' or although they are not in keeping or harmony with the general tenor or spirit of the legal system, the right is conferred on the parties as answering to a generic description; or the right is conferred on the parties as belonging to a class of persons, and is not conferred on specifically determined persons as bearing their individual or specific characters.

A so-called personal privilege transmissible to heirs or assigns, is, in so far as it is so transmissible, in the same predicament with a *privilegium rei*. In respect of the person to whom it is first granted, it may be deemed a privilege. For, in respect of that person, it is granted to a party specifically determined as

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bearing his individual or specific character. But, in respect of the heirs of that person, or in respect of the persons to whom he may assign it, it is not a privilege properly so called. The law confers it upon them, not as being specifically determined persons, but as being persons of generic descriptions or classes: that is to say, as being the persons who answer to the description of his heirs, or as being persons within the description of his alienees. And, accordingly, although the first grantee may acquire by the law directly, it is utterly impossible (as I shall shew immediately) that his heirs or alienees should take from the law without the intervention of a title.

Every privilege properly so called is, therefore, as it seems to me, a strictly personal privilege: an anomalous or eccentric right (or an anomalous or eccentric immunity from duty or obligation) which is conferred on a person specifically determined as being that very person. Whether the person be physical or individual, or fictitious and complex (or composed of many individuals), is irrelative to the matter in hand. The essence of a privilege properly so called, is, it appears to me, this: that the eccentric or anomalous right is conferred on a specific person, not as belonging to a class of persons, but as bearing the specific character peculiar to him or it.

Now a privilege properly so called, or a strictly personal privilege, may be conferred by the law (as meaning the law which confers it) immediately or directly: that is to say, without the intervention of a fact distinguishable from the law itself. All that is necessary to the creation of the right, is the designation of the specific person by his specific character or marks, and a declaration or intimation that the right shall reside in that specified party.

I say that the privilege *may* be conferred by the law immediately or directly. For even in the case of a strictly personal privilege, the law may confer the right through a *title*. For example: It may grant a privilege to a person now an infant *in case* he shall come of age. On which supposition, the privilege will not rest unless the infant come of age; and the fact of his coming of age, is therefore a title, or investitive fact, necessary to the consummation of the right.

But though a strictly personal privilege *may* be conferred by the law through a title, a title, or investitive fact, is not absolutely necessary to the being of the eccentric right. All that is absolutely necessary to the existence of a right of the class, is a mere designation in the law of the person on whom it is conferred,

coupled with some declaration or intimation that that person shall take it. LECT. LV

But where a right is not properly a privilege (or is not conferred on a specific person as being that specific person), the right arises of necessity through a *title*: through a fact distinguishable from the law conferring the right, and to which the law annexes the right as a consequence or effect.

For example: If you acquire by occupancy, or by alienation, or by præscription, you do not acquire as being the individual *you*, but because you have occupied the subject, or have received it from the alienor, or have enjoyed it adversely for a given time, agreeably to the provision of the rule of law which annexes the right to a fact of that description.

And the same may be said of the privileges improperly so called, which are either *privilegia rei* (or privileges annexed to *prædia*), or are so-styled personal privileges passing to heirs or alienees. It is as being the occupant of the thing, and not as being the very person who then happens to occupy it, that the occupant of the thing acquires the so-called privilege. And it is as being the heir or the alienee of the first grantee, and not as being the very person who is heir or alienee, that the heir or alienee of the first grantee takes the privilege mis-styled personal.

In short, wherever the law confers a right, *not* on a specific person as being such, the law of necessity confers the right through the intervention of a title. For, by the supposition, the person entitled is not determined by the law through any mark specifically peculiar to himself. And if the right were not annexed to a title, it follows that the person designed to take it could not be determined by the law at all.

Instead, therefore, of determining directly, that the right shall vest or reside in a specifically determined person, as being such, the law determines that the right shall reside in any person whatever who shall stand in some given relation to a fact of some given class.

It is manifest that duties, as well as rights, may arise from the law *immediatè*, or may arise from the law through the intervention of facts to which the law annexes them.

Where the duty is relative, it arises from the very fact which engenders the corresponding right. Consequently, if the right be a privilege properly so called, the relative duty, as well as the right, may arise from the law immediately. If the right arise

LECT. LV from a title, the relative duty as well as the right must arise from a title also.

In the case of absolute duties, the duty may either be imposed on a specified person as such, or may be imposed on a person through an intervening fact. In the first of those cases, the duty may be imposed by the law immediately or directly. In the latter of those cases, the fact through which the law imposes the duty, may also be styled a *title*. For, for the reasons which I shall assign hereafter, I apply the term *title* to every fact whatever, *through* which the law confers or extinguishes a right, or imposes or exonerates from a duty.

And what I have said of rights and duties in respect of their commencement, will apply to rights and duties in respect of their termination. For a right or a duty may terminate by a specific provision of the law exclusively applicable to the specific instance: On which supposition, it may terminate by the law without the intervention of a fact distinct from the law which extinguishes it; and it therefore may be said to terminate by the mere operation of law. Or the right or the duty may terminate through, or in consequence of, a fact to which the law has imparted that extinctive effect. On which supposition, the right or duty may be said to terminate through, or in consequence of, a *title*.

Functions
of titles.

I will now briefly advert to the functions of Titles: or, in other words, to the reasons for which rights and duties are commonly conferred and imposed through titles, and for which facts of some kinds are selected to serve as titles, in preference to facts of other kinds.

It is I believe impossible, that every right and duty should be conferred and imposed by the law immediately. For, on that supposition, all the rights and duties of every member of the community, would be conferred and imposed on every member of the community by a system or body of law specially constructed for his peculiar guidance: since every right or duty conferred or imposed by the law immediately, is conferred or imposed on a person determined by the law specifically.

It is only in comparatively few, and comparatively unimportant cases that rights or duties can be created or extinguished by the mere operation of the law. Generally speaking, rights must be conferred and extinguished, and duties imposed or withdrawn, through titles.

Independently, therefore, of every other consideration, titles are necessary as marks or signs to determine the commencement

of rights or duties, and to determine their end. In other words, titles determine the several rights, and the several duties, which respectively reside in, or are respectively incumbent upon, the several members of the community.

Titles are necessary, because the law, in conferring and imposing rights and duties, and in divesting them, necessarily proceeds on general principles or maxims. It confers and imposes on, or divests from, persons, not as being specifically determined, but as belonging to certain classes. And the title determines the person to the class.

But though the facts which serve as titles mark the beginnings and endings of rights and duties, it is not (generally speaking) for that reason only that the law imparts to those facts their creative and extinctive effects.

Independently of a given title serving as such a mark, there is generally another reason why it is selected as a title: A reason founded on utility, partial or general, well or ill understood. It is deemed expedient that the given fact should perform the functions of a title, in preference to other facts, which, as mere marks, might perhaps perform the functions equally well. For example: Considering a title as a mere mark determining the commencement of a right, it would be utterly indifferent whether a man's lands and goods passed on his decease to his children or to his remoter relations.

But for certain reasons, founded on obvious utility, his lands and goods generally pass to his children in preference to his remoter relations.

This reminds me of Sir William Blackstone's *reason* for the exclusion of the half-blood. He says it is a matter of indifference, because every right is the creature of law, which is as much as to say that, because all legal rights are created by the law, it matters not one rush what rights the law creates.

I conceive that all which can be said about titles in general is pretty nearly comprised in what I have now said. They are necessary as marks or signs of the beginning and ending of rights or duties. Why, in this or that case, this or that fact is annexed to a particular right or duty in the capacity of a title (which is as much as to say, why the right is given to this or that person rather than to another person, or a duty imposed upon one person rather than another), must depend on considerations of utility belonging to the particular case, or must be determined in the particular case by the particular views of utility taken by the legislator. I cannot see that anything can be said in general

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on the matter, but only that the reason for selecting facts to serve as titles ought to be founded on utility. There are, I apprehend, no common reasons applying to all titles alike. The reasons why property is conferred by occupancy are not the same as the reasons why it is conferred by alienation, by succession *ab intestato*, by heirs of certain classes, and so on. The reasons of utility are always peculiar to the given case.

I shall now add one or two remarks on the term title as used by English lawyers.

Bentham's
criticism
on the
word *title*.

Bentham, in the *Traité de Législation*, objects to the word title, that though it denotes the facts to which the law annexes rights, it does not commonly denote the facts through which the law determines or puts an end to rights. Where the fact which terminates one right does not give commencement to another, the term title does not apply to it. Where the same fact does extinguish an old and give birth to a new right, as is the case, for instance, with alienation, and all the titles styled derivative, the term is of course as applicable to the fact determining the one right as to that commencing the other. But where the fact determining the right establishes no new right, as where the right is determined by the destruction of the subject, the term title is not applicable to it, and it has no generic name whatever.

Another objection to the word title is, that it is not applicable to facts considered as engendering or extinguishing duties, relative or absolute. Where the duty is relative, perhaps a term is scarcely necessary, as the relative duty arises necessarily from the fact which engenders the corresponding right. But where the duty is absolute there is need of some generic expression for facts which engender or extinguish duties. The word title does not serve the purpose: we hardly speak of a title to a burthen or duty.

The same objections apply to the term *modus acquirendi* or *mode of acquisition* which is employed by the modern civilians, and by all the legal systems, which are mainly derivatives of the Roman law. We cannot talk of *acquiring* a duty.

Bentham, to obviate the inconvenience of this defective nomenclature, suggests the following terms. He proposes to call every fact whatever, by which a right or a duty is engendered or extinguished, a *dispositive fact*. These *dispositive facts* he divides into investitive and divestitive, meaning by investitive, facts which give commencement to rights and duties; by divestitive, facts which put an end to rights or duties. Investitive facts, again, he divides into *collative* and *impositive*, collative being such investitive facts as *confer* or give beginning to or

impose *duties*. Divestitive facts he distinguishes into *destructive* or *privative*, and *exonerative*, meaning by the former, facts which put an end to rights; by the latter, those which extinguish or relieve from duties. LECT. LV

I confess, however, that I doubt whether this multitude of expressions is of much use, and there are some objections even to these terms. An investitive fact is hardly a general expression for any fact which confers rights or which imposes duties. The word to *invest*, in common usage, is confined to a right: a person is not said to be invested with a duty. The same objection applies to the word *divestiture*: a person can hardly be said to be divested of a duty. The words *destructive* and *privative*, as applied to rights, imply that all rights are beneficial, and that there are no rights which are purely onerous. Now the rights of trustees of all classes are as purely onerous as any duties whatever. These words, however, clearly denote that the party who loses the right, is deprived of an advantage. Proposed use of *title* with extended meaning.

It appears to me most commodious to use the common term title in the large sense which I have annexed to it, as meaning any fact, by the intervention of which the law invests or divests a right, or imposes or withdraws a duty.

It is remarkable that the Roman lawyers have scarcely any settled generic name for investitive or divestitive facts. They generally employ some kind of circumlocution. Even the phrase *modus acquirendi* was not theirs, but devised by the modern civilians. The Roman lawyers themselves talk of the *acquisition* of rights; the way in which rights are *taken away*, or in which parties are exonerated from obligations; the *solution* or the *redemption* of obligations, and they have a vast variety of other terms to express these various ideas, but no systematic language by which they attempt to divide titles into classes. The inconvenience would, I think, be substantially removed, by using *title* in the wide sense which I have proposed to annex to it.

Sir William Blackstone himself often seems to use *title* to designate a fact which ends a right as well as one which begins it, so that the large import which I think it commodious to give to the term would not to a great extent shock established usage.

As I remarked in my tables, the word *titulus* in Roman law, is not at all equivalent to title in the English. It is not a mode of acquisition, but a part only of a complex mode of acquisition; and even in that narrower sense it is only applied in a few cases, namely certain cases in which rights are acquired by tradition and by præscription.

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A title may often be separated into two distinct facts or sets of facts—an antecedent and a consequent; and then *titulus* is the name given to the antecedent part, *modus acquirendi* to the residue or consequent part of the mode of acquisition. The word *titre* in the French law is always understood in the same sense. It never means, as with us, *mode of acquisition*.

NOTES.

Meanings of the word Privilege in English Law.

Privilege never denotes, as it did in the Roman Law, a law: It sometimes seems to denote a *right* enjoyed by a peculiar class: In this sense it belongs to the Law of Persons: Sometimes it seems to denote rights enjoyed by the subject against the Sovereign. Origin of this meaning.

[See *ante*, 'Liberty;' 'Limitation of sovereign power.' Monopolies.* *Ante*, 'Jus in re et ad rem.']

*Remarks on Terms.**Objection to the term 'Title,' as used by the English Lawyers.*

Though it denotes the facts to which the law annexes rights, it does not denote completely the facts through which it determines rights.

Where the fact which determines a right does not at the same time give commencement to another, the term 'title' does not apply to it. Further, it is not applicable to facts as engendering or extinguishing duties, be they relative or be they absolute.

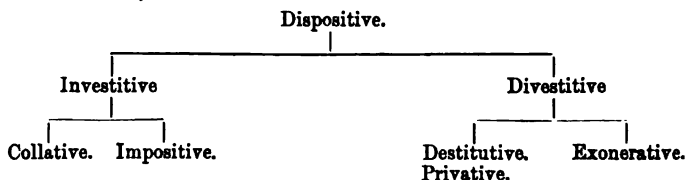
[For another use of the word 'title,' by English Lawyers, see Table II. *post*.]

The same objections apply to 'mode of acquisition.' We cannot talk of acquiring a duty. Nor will acquisition apply to the termination of a right or duty. [Bentham's suggestions, *Traité*, vol. i. p. 280.†]

* Bentham, *Princ.* pp. 229-292.

† 'Bentham's suggestions' are in favour of 'une série de mots qui se correspondent; ou un nom pour le genre et des termes spécifiques subordonnés. Prenez le mot *titre*, la ramification lo-

gique s'arrête au premier pas. Point d'espèces de titres,' etc. The terms suggested by Bentham are arranged in the following tabular form, in the margin of the book.



Mr. Austin's objection to these terms will be found further on.—S. A.

I shall use *title* in the large sense which I have already annexed to the term: i.e. as denoting any fact through which the law invests or divests a right, or imposes or withdraws a duty. LECT. LV

Titulus, by Blackstone, denotes divestitive as well as investitive events.

1. *Titulus*.

2. Duration of right (including certainty or continuity of termination).

3. Commencement, whether of right or enjoyment (and then determination of preceding rights).

4. Severally and commonly.

5. Extent of right in respect of power of using, deriving services from, or dealing with the subject.

Quere. Whether power of aliening (which as against successors is a sort of annihilation) belong to this, or to duration?

Things, or subjects of rights also considered under this last head.

—*Marginal Note in Blackstone*, vol. ii. chap. 23, p. 381.

Terminology.

I shall use indifferently, 'mode of acquisition, title, cause, investitive event,' etc.: unless I attach specially a more special meaning.⁹⁶

Various circumlocutions, after the manner of the Roman Lawyers, may also be used. They have no settled generic terms.

'*Jurium amissionis causæ*.' '*Solutio, extinctio, etc. etc.*'⁹⁶

No settled name, in the Roman law, for facts determining rights and duties.

By Roman Lawyers, and in the language of the derivative systems, *titulus* never means a *title* in the sense of mode of acquisition.

The names of *Tituli* ought to be the names of the incidents which give rise to rights and obligations, and not of the rights and obligations themselves, or of their subjects.

'*Titulus*' is applicable to the incidents which give rise to *Jura ad Rem*, as well as to those which beget *Jura in Re*; But is not applicable to incidents as begetting obligations, whether they be absolute or relative, or whether they correspond with *Jus in Re* or *Jus ad Rem*. Nor is it applicable to incidents which put an end to, or to incidents as putting an end to, either rights or obligations. '*Modes in which obligations are extinguished or removed*,' seems to be the only expression in the Roman law for this purpose; and that only applies to obligations, *stricto sensu*.⁹⁷

Similar remark made before, about capacities and faculties.

Objections to the term Title in the sense of the English Lawyers:—

1. That though it denotes the incident which gives beginning to

⁹⁶ Mackeldey, vol. ii. p. 40.

⁹⁶ Hugo, *Gesch.* pp. 249, 576.

⁹⁷ *Ibid.* p. 263. Blondeau, vi.

LECT. LV a right, it does not denote the incident which puts an end to it, or only by implication; (*connotes* but not *denotes*.)

2. That it only connotes the incident as giving origin to the corresponding obligation, and as putting an end to it.

There is the same objection to 'Acquisition,' or *Modus acquirendi*. In the sense in which the term '*Titulus*' is used by the Roman Lawyers, it denotes, not a mode of acquisition, but a condition necessary to the efficacy of a mode of acquisition: viz. tradition (or rather the incident of which tradition is the evidence). '*Causa remotior: Consideration.*' (See Table II. *post.*)

Another objection to '*title*' (and perhaps to '*mode of acquisition*') is,—that it is partial, even with regard to the incidents which give beginning to rights. It is not applicable to the incidents which give beginning to *Jura ad Rem*. (*Sed Quære.*)

The Roman Lawyers seem to extend 'acquisition' to rights *ex contractu* and *quasi ex contractu*, and even to rights *ex delicto*.

Objection to '*investitive and divestitive incidents*;' that in common language 'vest,' 'invest,' etc. only apply to vested rights.

'*Modes (or Incidents) in which Rights and Obligations begin and end,*' avoid all these inconveniences; extending even to the obligations which begin in crimes.

Mode, like *title* or *incident*, denotes, properly, the fact stripped of its evidentiary and other conditional matter.

LECTURE LVI.

THE SUBJECT OF TITLES CONTINUED.

LECT. LVI CONTINUING the disquisition concerning titles in general, which I began in my last Lecture, I would remark that, *titles* (or the facts *through* which the law confers and divests rights, or, *through* which the law imposes and withdraws duties) are divisible into *simple* and *complex*.

A title may consist of a fact which is deemed *one* and *indivisible*, and is said to be simple. Or a title may consist of a fact which is *not* deemed one and indivisible, but is esteemed a number of single and indivisible facts compacted into a collective whole, and may then be called complex.⁹⁸

Titles distinguished into simple and complex. But really always complex.

And here it is obvious to remark, that every title is really complex. In the case, for example, of acquisition by occupancy (which perhaps is the least complex of all titles), the title, though deemed simple, consists, at the least, of three distinguishable facts: namely, the negative fact that the subject occupied has no previous owner; the positive fact of

⁹⁸ Bentham, *Traills*, vol. i. p. 273.

the occupation, or of the apprehension or taking possession of the subject; and the positive fact of the intention, on the part of the occupant, of appropriating the subject to himself:—*animus rem sibi habendi*. LECT. LVI

Nay, each of the simpler facts into which a title deemed simple is immediately resolvable, may itself be resolved into facts which are still more simple or elementary. The negative fact, for example, that the thing acquired by occupancy is *res nullius*, is the absence or negation of that multitude of facts which are imported by the positive fact of a thing being owned already. And the fact of the apprehension or taking possession, or the *animus* or intention, on the part of the occupant, *rem sibi habendi*, is also resolvable into a number of facts which it would take a long treatise to distinguish and describe.

Consequently, a so-called *simple* title is a title consisting of parts, which, for the purpose contemplated by the speaker, it is not necessary to distinguish: whilst a so-called *complex* title is a title consisting of parts, which, for the same purpose, it is necessary to consider separately. The terms simple and complex, as applied to titles, are merely relative expressions. For one and the same title as viewed from different aspects, or one and the same title as considered for different purposes, may be simple and complex.

If the distinction of titles into simple and complex have any other meaning than the one which I have now mentioned, that other meaning is founded on a difference of degrees.—Though all titles are complex, some are *more* complex than others. And such as are more, and such as are less complex, may be divided loosely into complex and simple, and distinguished by these epithets.

According to Bentham, in his '*Vue générale d'un Corps de Droit*,' the distinguishable facts which constitute a complex title, are divisible, in some cases, into '*principal*' and '*accessory*.' Looking at the *rationale* of the distinction which he seems to have in view (and which is a distinction of great practical moment), I should think that *essential* or *intrinsic*, and *accidental* or *adventitious*, would be more significant than principal and accessory.

Component elements of a complex title. Principal and accessory.

The *rationale* of the distinction appears to be this:

As I remarked in my last Lecture, titles serve as signs or marks, to denote that such or such rights have vested in such or such persons; that such or such duties are incumbent on such or such persons; that such or such rights have ceased or been

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divested, or that such or such duties have been withdrawn or removed. In other words, it is through the medium of *titles* (except in the comparatively few, and comparatively unimportant, cases, wherein rights and duties are conferred and imposed by the law *immediate*, or are divested and withdrawn by the law *immediate*), that the respective rights and duties of the several members of the community are distributed or assigned. Setting aside those comparatively few, and comparatively unimportant cases, persons are invested and burthened with rights and duties, or are divested and discharged of rights and duties, not as being determined by their specific or peculiar characters, but as belonging to *classes* of persons. And it is through the medium of the various titles, that they are determined respectively to those various classes.

But, as I also remarked in my last Lecture, it is seldom that a right or duty is annexed to a title, or that a right or duty is divested or withdrawn by a title, merely because the title serves as such a mark. For, if the title merely served as a mark to fix the commencement or determination of the right or duty, almost any fact might serve the turn as well as the fact which *is* the title. There are generally certain reasons, derived from the nature of the fact which serves as a title, why such or such a right should be annexed to that fact rather than another, why such or such a duty should be annexed to that fact rather than another, or why that fact rather than another should divest such or such a right or duty.

In short, a title serves to *mark*, that this or that person has been invested or burthened with this or that right or this or that duty: or a title serves to mark, that this or that person has been divested of, or exonerated from, this or that right or this or that duty. But, independently of its use in serving as such a mark, there are generally or always reasons, derived from the nature of the fact which *is* the title, why the given person should be so invested or burthened (or should be so divested or exonerated), through, or in consequence of, that very fact.

Now it may happen, that, looking at the reasons or purposes for which a given right is annexed to a given title, *all* the facts of which the title is constituted are of its very essence. In other words, the right could not arise (consistently with those reasons or purposes) through or in consequence of the title, if *any* of the simpler facts into which the title is resolvable were not an ingredient or an integrant part of it.

But it may also happen, that, looking at the reasons or

purposes for which a given right is annexed to a given title, one or more of the facts of which the title is constituted are *not* of its very essence. In other words, the right might arise (consistently with those reasons or purposes) through or in consequence of the title, though one or more of the facts of which the title is compounded were *not* constituent parts of it.

For example: Looking at the reasons for which a convention is made legally obligatory, or for which legal rights and duties are conferred and imposed on the parties to the agreement, a promise by the one party, and an acceptance of the promise by the other party, are of the essence of the title.

But in certain cases, a convention is not legally binding, unless the promise be reduced to writing, and the writing be signed by the promissor: or unless the promise be couched in a writing of a given form: or (generally) unless the contracting parties observe some solemnity which has no necessary connexion with the promise and acceptance.

Now, though the given solemnity, let it be what it may, is, in all such cases, a constituent part of the title, it is not of the essence of the title. For, looking at the general reasons for which conventions generally are made obligatory, or at the particular reasons for which rights and duties are annexed to conventions of a particular class, the right and duty might arise (consistently with those reasons), although the solemnity were no portion of the title. The solemnity may be convenient evidence of that which is essential to the title, but, though it is a part of the title, it is not necessarily such.

Now where the right might arise (consistently with the reasons for which it is annexed to the title), though some of the facts constituting the title were not component parts of it, the several facts into which the title is resolvable may be divided into *essential* and *accidental*, *intrinsic* and *adventitious*, or (in the language of Bentham) *principal* and *accessory*. The facts which are essential or principal are parts of the title, because they are absolutely necessary to the accomplishment of the purposes for which the right is annexed to the title by the lawgiver. But the facts which are accidental or accessory, are constituent parts of the title, not because they are *necessary* to the accomplishment of those purposes, but for some reason foreign to those purposes, or merely to render their accomplishment more sure or commodious.

The distinction between essential or principal, and accidental or accessory facts, may hold in the case of a title which merely

LECT. LVI } imposes a duty, or which divests or withdraws a right or duty, as well as in the case of a title which invests with a right. But, for the sake of simplifying my language as much as I can, I confine myself to titles considered as investing with rights.

Where some of the elements of a title are accidental or accessory, they (generally speaking) are merely subservient to the essential or principal parts of it. For example: They serve as *evidence*, preappointed by the law, that that which is substantially the title has happened. This is the case, wherever tradition or delivery of the subject, or a writing with or without seal, or an entry or minute of the fact in a register, or any other solemnity of the like nature, is a constituent part of a valid alienation of a thing of a given class.

The essentials of the alienation, as between the alienor and alienee, are a free will and intention on the part of the former to divest himself of the right, and to invest the other with it; an acceptance of the proffered right by the alienee; and some fact, or another, evincing or signifying such intention and acceptance. The tradition, the writing, the entry in the register, or the other solemnity, is merely evidence, required or preappointed by the law, of that which is essentially the title.

Some evidence of the intention and acceptance is indeed absolutely necessary. But evidence other than the solemnity which is a constituent part of the title (as, for example, a verbal declaration), might also serve as evidence of the intention and acceptance. The case of a writing, or other solemnity, which is merely preappointed evidence of the facts that are essentially the title, but which nevertheless is a constituent part of the title, shows clearly the nature of the distinction between the essential or principal, and the accidental or accessory parts of a title.

The evidentiary fact is made a part of the title, or is rendered necessary to the validity of the title, in order that that evidence of the substance of the title, which the lawgiver exacts, may be provided by the party or parties with whom the title originates.

The invalidity or nullity of the title, in case the evidentiary fact be not a constituent part of it, is the *sanction* of the rule of law by which the evidence is required. But it is clear that the rule of law might be sanctioned otherwise: and that, if it were sanctioned otherwise, the pre-appointed evidence, though still requisite, would be no part of the title.

For example: The absence of the given solemnity, instead

of nullifying the title (or being made a presumption, *juris et de jure*, that the title had not accrued), might be made a presumption *prima facie*: that is to say, a presumption which the party insisting on the title might be at liberty to rebut, by explaining the reason why the prescribed solemnity had not been observed, and by producing evidence, *other* than the pre-appointed solemnity, that the title *had* accrued.

Or the absence of the given solemnity might be visited on the party bound to observe it, not by nullifying his title, but by punishing him with a pecuniary fine.

And, on either of these suppositions, the prescribed solemnity, though still prescribed or exacted, would not be *indispensable* evidence of the *substance* of the title, or (what is the same thing) would not be a *constituent part* of the *whole* title. For it is manifest, that, wherever an evidentiary fact is indispensable evidence of a given title, *that* evidentiary fact is a component part of the title, although it is not an *essential* part, but is merely an *accidental* or *adventitious* one.

I have said above, that where some of the elements of a title are non-essential, they (generally speaking) are merely subservient to the essential parts of it. In other words, though they are not absolutely necessary to the accomplishment of the purposes for which the law annexes the right to the title, they tend to render the accomplishment of those purposes more certain or commodious. This, for example, is the case, where a solemnity which is merely evidentiary of the title, is made in effect a part of the title, inasmuch as the title is not complete or valid, in case the solemnity be not observed by the parties.

But it not unfrequently happens, that the accidental parts of a title are in no respect subservient to its essential or principal parts. In other words, they are completely foreign to the reasons or purposes for which the right in question is annexed by the law to the title.

This, for example, is the case, wherever a deed or other writing is indispensable evidence of the title, and where moreover the writing is not admissible evidence, in case a stamp was not affixed to it when the alleged title arose. In this instance, the stamp is made a part of the title, not because it has any connection with the essentials or substance of the title, but to secure the due payment of a given tax.

And here, again, the distinction between the essentials and the accidentals of the title is glaring and manifest.

The nullity or invalidity of the title, in case the stamp be

LEOT. LVI not affixed when the alleged title arises, is the *sanction* of the law which imposes the tax. But it is clear that the law imposing the tax might be sanctioned otherwise: As, for example, by a fine on the party, whose duty it was, when the alleged title arose, to pay the tax, and to procure the fixation of the stamp to the evidentiary instrument.

In practice, the law imposing the tax is often sanctioned in the manner which I am now suggesting.—Although the duty ought to have been paid, and the stamp affixed to the evidentiary instrument, when, or immediately after, the alleged title arose, still the instrument is admissible evidence of the title, if a tax *and penalty* be paid, and a stamp be affixed to the instrument, subsequently to the time prescribed for those purposes. And, in this case, the payment of the tax, though still requisite, is no *part of the title*.

Before I quit the topic now under consideration, I would remark that, in many cases, it is not easy to distinguish the essential or principal, from the accidental or accessory elements of a title.

This, for example, is the case, where an accidental element is made a part of the title, because it is deemed commodious *evidence* of the substance or essence of the title. Here, the evidentiary fact is an *accidental* part of the title, not absolutely, but only in a qualified manner. For *some* evidence of the title is indispensable or necessary, inasmuch as the title could not be sustained (in case it should be impugned), if *some* evidence of it be not forthcoming or producible.

The pre-appointed evidence is therefore an accidental or accessory part of the title, not because *evidence* is not essential to the validity of the title, but because evidence of the *class* or *description* which the law preappoints or prescribes, is not the *only* evidence by which the title might be sustained. The law might leave the parties to provide what evidence they pleased of the title; and might empower the tribunals to admit the evidence provided by the parties, if they deemed it satisfactory. By determining therefore that evidence of a *sort* shall be indispensable, the law adjoins to the title an element which is properly accidental or accessory.

And the same may be said of every case, in which a fact of a given *genus* is inseparable from the title, but in which the law determines the *species* or sort.

For example: Assuming that acceptance by the heir is a necessary part of his title to the heritage, but that the law

prescribes, under pain of nullity, the form or manner of the acceptance, it is clear that the prescribed acceptance is an accidental part of the title, in so far only as the law determines the *manner* of the acceptance, instead of leaving him to accept it in any manner whatever. LECT. LVI

I assume, merely for the sake of example, that the assent or acceptance of the heir is a necessary ingredient in every title to a heritage. In truth, it is not. For, in the earlier Roman Law, there were certain heirs, styled *heredes necessarii*, upon whom the heirship, with the acquittal of the deceased's obligations, was imposed as a duty. Though, afterwards, they were enabled, by taking certain steps, to repudiate the heirship: or, at least, were only bound to acquit the obligations of the deceased, in so far as the faculties or means devolving from him would suffice for that purpose.

It is doubtful how far acceptance is necessary in our own law: it clearly is so in case of the executor or administrator. If he do not take out probate or letters of administration, the estate and effects of the deceased do not devolve on him. But is acceptance necessary in case of the heir? I think yes: for without seisin (a voluntary act) he is not completely heir: *seisina facit stipitem*.⁹⁹ If the successor does not seise, and dies, the estate passes not to his heir but to the heir of the immediate ancestor. Moreover, seisin was originally the feudal investiture, the acceptance of the heritage from the lord. Before fees became hereditary, it was necessary to take a re-grant from the lord of the fee: for this re-grant seisin was afterwards substituted. Now this must necessarily have been a merely voluntary act.

At all events, he is not answerable beyond assets.

I have insisted on the distinction between the *essential* and the *accidental* parts of a title, because they are often confounded. This is particularly the case, as I shall shew hereafter, where the accidental parts are merely evidence, predetermined by the law, of that which is substantially the title itself.

I said, in my last Lecture, that wherever a right or duty is conferred or imposed by a law *through an intervening or mediate fact*, or wherever a right or duty is divested or withdrawn by a law through an intervening or mediate fact, the right or duty may be said to be conferred or imposed, or may be said to be

⁹⁹ This rule is no longer applicable to person last entitled. (3 & 4 Will. IV. tenements in England, the law of intestate succession being now, in all hereditaments, regulated by descent from the last purchaser, or (in certain cases) the son. H. of Lords, Feb. 25, 1869.—R.C.

Lect. LVI { divested or withdrawn, through, or in consequence of, a *title*: meaning by a title, such intervening or mediate fact.

I also said, that wherever a right or duty is conferred or imposed by a law *without the intervention of a fact distinct from the law itself*, or wherever a right or duty is divested or withdrawn by a law without the intervention of a fact distinct from the law itself, the right or duty may be said to be conferred or imposed, or to be divested or withdrawn, by the law, immediately or directly: or the right or duty may be said to be conferred or imposed, or divested or withdrawn, *ipso jure*; by the act or operation of the law; or by the *mere* act or operation of the law.

And this, I apprehend, is the correct, as it is the obvious, meaning of all such expressions as the following: namely, 'rights and duties *ex lege*;' 'rights and duties *ex lege immediatè*;' 'rights and duties which are divested and extinguished *lege immediatè*;' 'rights and duties which arise, or are divested or extinguished *ipso jure*;' or 'which are created, or divested or extinguished, by act or operation of law.'

Improper applications of the expressions *ex lege immediatè*, &c.

But in the language of our own law, and of other particular systems of positive law, these and the like expressions are not used with the meaning, or not used exclusively with the meaning, which is obviously the proper one. In the language of our own, and of other particular systems, they are always or commonly applied improperly: in cases, that is to say, in which the right or duty is not created or divested by a law *without the intervention of a fact distinct from the law itself*; but is really created or divested by a law *through a mediated or intervening fact*: that is to say, through a *title*.

These improper applications of the expressions which I have just enumerated, and of various other expressions of the same purport, may be reduced, I think, to two.

1st. Their use to indicate whether or not an act of the party entitled is part of the title.

First, in some cases of title, the title, or one or more of the several facts constituting the title, is some *act* done by the person who is invested with the right, who is divested of the right, on whom the duty is imposed, or who is exonerated from the duty. But in other cases of title, neither the title, nor any of the several facts constituting the title, is an *act* done by that person. The will of the person (with reference to all the facts which constitute the title) is perfectly *quiescent*: or if his will be active, it is merely active in the way of forbearance from some given act. Now where the title is in this latter predicament, the right or duty is said to arise, or to be divested or withdrawn, '*lege immediatè*;' '*ipso jure*;' by act or operation of law;' by *mere* act

or operation of law ;' and so on : These and the like expressions really denoting (*not* that the right or duty is invested or divested without the intervention of *any* title, but) that the title, by which the right or duty is invested or divested, is not any act of the invested or divested person, and does not comprise any act of that same person.

For example : according to the Roman law, heirs of certain classes, whether they be heirs *ex testamento*, or heirs *ab intestato*, are not heirs completely, unless they *accept* the heritage. And, accordingly, such heirs are styled *voluntary*, or are said to acquire by their own act. But on heirs of other classes, the inheritance devolves, whether they wish it or not, on the decease of the testator or intestate, without an act of their own. And, accordingly, such heirs are styled *necessary* (or heirs necessitated or obliged to take), and are said to take the heritage *ipso jure*, or, as we should say, *by mere operation of law*.

Again Blackstone says,¹ that purchase or *perquisitio* is distinguished from acquisition by right of blood, and is made to include all modes of acquisition except inheritance ; because in this last case the title is vested in the party, not by his own act or agreement, but by simple operation of law. This is clearly a mistake : it vests in him by descent, but not by simple operation of law ; for if he did no act amounting to seisin it would not vest in him, analogously to those heirs by the Roman law, who were said not to take, *ipso jure*, but by their own act.

Again : Where, according to our own law, a man grants a particular estate (as an estate for years or life) to one, with a remainder over to another, the remainder is said to be created by his own act. But where he grants a particular estate, and does not part with the remnant of his own estate, that remnant is styled a reversion, and is said to arise by the act or operation of law. For though by the grant of the particular estate he does an act, he does no act in respect of the remnant, but the remnant continues in him, or, if you will, reverts to him, through his mere omission or forbearance from granting it away : though by the figment of seisin the whole estate is said to pass out of him by the grant, and the remnant of course must be said to *revert* to him when the particular estate has expired. The *rationale* of the matter is that he grants away the particular

¹ 'By inheritance the title is vested in a person, not by his own act or agreement, but by the single operation of law.'—Blackstone, vol. ii. p. 241.

Differing in this from the Roman heir, whose *aditio* (or some equivalent act)

was a necessary link in the chain of title : The English heir (it is presumed) is obliged to repudiate ; and *quare*, the manner of this at Common Law !—

Marginal Note.

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estate, but does not grant away the remnant, which therefore continues in him. But assuming that the whole estate goes out of him, and that a new estate is created, which is called a reversion, and which returns to the grantor, this estate is said to come to him by mere operation of law. Speaking rationally no new estate is created.

Again: According to the later Roman law, the absolute property *rei singulæ* cannot be acquired commonly without an apprehension or a taking possession of the thing by the acquirer: by an apprehension consequent on tradition, in case the thing be acquired through an alienation, or by an apprehension without tradition, in case the thing be acquired otherwise than through an alienation. But, in some cases, property vests in the acquirer without an act of apprehension. And in these cases, the passing or vesting of the property is styled by modern civilians '*transitus legalis*;' ² that is to say, it passes by the law to the acquirer, without an act of his own, or, at least, without an apprehension by him; without that act of apprehension by him, which, in the other cases to which the cases in question are opposed, that particular act on his part is requisite.

2ndly. To distinguish certain well known titles.

2ndly. Another improper application of the expressions in question seems to be this:

Certain classes of titles, or of modes of acquisition, have concise names: as, for example, 'occupancy,' 'alienation,' 'præscription,' and so on.

But other classes having no concise names, and not being expressible without long circumlocutions, they are commonly lumped up together, and opposed to the classes which have such names, by the expression '*ex lege*,' '*ex lege simpliciter*,' '*ex lege immediatè*,' etc. This, at least, appears to be one of the meanings which are annexed by the Roman lawyers and the modern Civilians to such expressions as 'rights and duties *ex lege*,' '*ex lege simpliciter*,' and so on. The writers enumerated *title by tradition*, *title by occupancy*, *title by præscription*, and then having exhausted the titles which had obtained concise names, they came to other titles which they lumped together under the name of *title ex lege*. At least this is one of the meanings sometimes annexed to the term by the Roman lawyers and by modern Civilians. It answers to the use of the phrase *quasi-contracts*. Rights and duties which are said to be *quasi ex contractu*, are in truth rights and duties of various classes, which have no concise generic name at all, and are opposed, under the above expression,

² Thibaut, *System*, vol. ii. p. 32.

to rights and duties arising from contracts and from delicts. LECT. LVI
 Various classes of modes of acquisition, having no concise general names, are lumped up under that name, and are opposed under it to those which have obtained such names.

There is, perhaps, a third improper application of the above expressions; but I do not feel quite certain on the subject. There are cases in which the law annexes to alienations, contracts, and other dispositions, certain consequences at the option of the parties, and other cases in which it annexes certain consequences, whether the parties will them or no. In the latter case, these consequences are said to be *publici juris*: meaning that they are so connected with the transactions that the parties cannot avoid them if they will. This is what is meant by the maxim to which I have formerly alluded, that *jus publicum* is not defeasible *pactis privatis*.

Now, where a consequence is annexed to a title, whether it is expected by the parties or not, or is made inseparable from the title, whether they wish it or not, those consequences may be said to arise by mere act of the law, as opposed to those which arise from the dispositions of the parties. There are several cases of this sort. In Equity (for example), the vendor has a lien on the estate, for the security of the purchase money. Though the parties should make no provision to that effect, by the terms of the contract, the law itself would annex that condition to the purchase.

The vendor might of course expressly relinquish his lien, but if nothing is said to the contrary, he has a lien. I am not sure whether he would be said to have it by mere operation of law.

In the Roman and in the French law, there is something analogous. In a marriage, whether it be so provided in the contract or not, the wife has a *hypothèque légale* on the goods of the husband for the security of her dower.

It is called *hypothèque légale* in opposition to any *hypothèque* or *lien* which she might acquire by special contract. It is sometimes also called a *tacit* as distinguished from an *express* *hypothèque*.

There may be other meanings of the phrases in question, but I do not recollect them.

These improper applications mostly arise from not considering that every right and duty must arise and be determined by law. They are all consequences of law; but some arise or are divested through a title, others without the intervention of any title, and these last can alone be said with correctness to arise from the law immediately.

LECTURE LVII.

TITLES VARIOUSLY CLASSIFIED.

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LVII.

[The following Lecture is the last given by Mr. Austin at the London University. It was delivered on the 26th of June, 1832, after which, he was compelled by ill health to terminate his course abruptly, and go abroad.

He had begun to write the Lecture, but could get no further than these notes, which, as the reader will see, are but suggestions for his spoken discourse.

There remains a mass of papers containing heads of the subjects which he had treated, or which he intended to treat. It has not been thought expedient to print them. I have, however, made an exception in the case of the Notes 'on Contracts and Quasi-Contracts,' which evidently were intended to form the groundwork of the next Lecture. They are referred to at p. 901, *post.*—*S. A.*]

IN my last two Lectures, agreeably to the order which I announced in the Lecture preceding them, I submitted to your attention certain remarks applicable to titles in general.

Titles by
which
rights in
rem are
acquired or
lost.

I now proceed to certain leading divisions of the titles which properly belong to the department of the Law of Things, through which I am now travelling: namely, the titles by which rights *in rem*, considered as existing *per se*, are acquired or lost, or invested and divested.

But even in considering these titles, I shall be obliged to advert occasionally to titles of other classes.

Various
attempts
at classification.
Doubtful
whether
any successful.

These various divisions are disparate and cross. They are various attempts to find a basis for a classification or arrangement of the various genera and species of titles. I am not certain that any such is practicable or useful:—whether it be not better to select the principal titles, and then to add a miscellany—*ex lege*.

This is the case in Blackstone, 'the French Code,' Ulpian, Bentham. In none of these is there any attempt to reduce in the first instance the whole mass of titles into two, three, or some small number, of very extensive genera, and then refer the various subordinate genera and species to them. They begin by placing on a line a considerable number of genera which are comparatively narrow: and perhaps eke out these by a miscellaneous head.

The great difficulty is the mixed character of most of the titles which in every system occur.

Titles ex Jure Gentium and ex Jure Civili.

Modes of acquisition *ex jure civili* are many of them not peculiar, but are merely peculiar modes of modes which may be deemed universal: modes accompanied by peculiar formalities.

(Heineccius, lib. ii. tit. i.-vi.)

Inconvenience of the division into titles *ex jure gentium* and *ex jure civili* as a basis for classification.

The arrangement of titles in Gaius and the Institutes, mainly founded on this division.

(See Gaius, lib. ii. Inst. lib. ii.)

Absurd mode in the Institutes of placing servitudes between these two sorts of titles; servitudes being *ex jure civili*.

Acquisitions *per universitatem* are not included under either department.

But the distinction between prætorian and civil law does not quadrate with the distinction in question.

The only practical consequence of the distinction (as I have remarked already) applies to crimes *juris gentium* and crimes *jure civili*.

Original and Derivative Titles.

Import of the distinction. Its inconvenience as a basis for a classification of titles. Would separate modes of acquisition which it is convenient to consider together: as, *e.g.* occupation of a subject *nullius*—or by dereliction.

Succession not co-extensive with derivation. As, *e.g.*: in the case of constitutive alienation. So in the case of commixtion, specification, etc.

Succession sometimes means succession to the dead, *ex testamento* or *ab intestato*.

Investitive events are original or derivative: *i.e.* acquired from the State directly, as in cases of occupancy; or from or through a person in whom a right or its subject formerly resided.

The distinction appears to be confined by some to rights *ex jure gentium*:

By others, to acquisitions of *dominium* or property, pre-eminently so called, and other *jura in rem*: But is just as applicable to *jus in personam*: *e.g.* Assignee of a contract: Succession by heir to rights *in personam* of deceased.

The distinction appears to be useless, except for this purpose:

that in many cases of derivative titles, the party is subject to duties passing from the party from whom his right is derived.

Attempts at Classification.

Title by descent and title by purchase.

A convenient division in the Law of English real property, for reasons given by Christian and Blackstone.³ But a division only of one class of rights: rights *in rebus singulis* falling under the law of real property.

It would not be a convenient basis for a general division: And, accordingly, modes of acquiring personal property are not divided in that manner.

It is not complete, even with reference to real property.

Having suggested certain of the leading divisions of the titles by which *jura in rem per se* are invested and divested, I shall now proceed to consider *seriatim* certain of their classes.

These classes are, in every system, extremely numerous: So numerous, that only some, and perhaps a comparatively few, have gotten concise names. Whence, as I remarked before, the expression, '*ex lege*;'—analogous to '*variis causarum figuris*' in cases of obligations.

I shall only consider such as, in some form or other, occur in all or most systems; and of these, only the more important.

I shall consider them, principally, as they regard absolute property.

In treating them, I shall abide as far as possible by Thibaut's division; *i.e.* shall consider first, the one-sided titles (or not alienations *sensu stricto*). For these I shall compare Mühlenbruch, Mackeldey, Thibaut, Blackstone, Bentham, and others.

One-sided Modes of Acquisition, and Two-sided.⁴

This seems to be substantially a division into alienation (strictly so called), and all other modes of acquisition.

It does not quadrate with original and derivative, or *jus civile* and *jus gentium*.

Mühlenbruch's division (MS. see Table, in vol. ii. p. 245)⁵

³ Blackstone, vol. ii. pp. 200, 241-3.

⁴ Thibaut, *System*, vol. ii. p. 32, etc.

⁵ A copy of this Table, taken from the margin of the page in Mühlenbruch cited in the text, will be found at the end of this Lecture. The matter of which it is a condensation extends over seventeen pages.—S. A.

is bottomed on the division of titles into such as are *ex jure civile* and such as are not.

Occupancy.

Occupancy is only a species of appropriation: (*Sed quæ*).—In case of the acquisition of a servitude, etc., præscription must combine with appropriation.

Occupancy, what. Occupancy of *res nullius*, and adverse occupancy of *res alicujus*. Physical and legal possession.

(To be examined particularly under 'Right of Possession.')

Distinguish between physical occupancy (or putting a thing to any of the uses of which it is susceptible), and legal occupancy.

Remark on the talk about occupancy being the origin of property, etc.

[Blackstone, vol. ii. chap. i. p. 9.]

Why it ought to give a right.

[Bentham, vol. ii. p. 110.]

Where society and law are established, the original reasons in a great measure cease. It is then little more than a mark. And this is a reason for carrying over to the fisc, or to private persons determined in the way of devolution.

Alienation.

Essentials of an alienation.—Voluntary transference.—Acceptance of transfer:—*Causa* or inducement being implied.

Voluntary alienation opposed to involuntary, as meaning alienation compelled by law. The latter would come under the head of 'adjudication.'

The various modes of alienation, are merely evidentiary.

Solemnities adjoined to Alienations:

1st. For the protection of the parties to the alienation: A doctrine including the doctrine of Evidentiary Instruments, and the doctrine of Considerations.

2ndly. For the protection of strangers to the alienation: A doctrine including that of Registration. See *post*, 'Contracts,' 'combinations of *jus in rem* and *in personam*,' 'evidence.'

Limits to the application of registration and of other precautionary solemnities, arising from the nature of the subject.

Many remarks touching solemnities adjoined to alienations apply, *mutatis mutandis*, to solemnities adjoined to other titles.

Where *Jus in Re* passes by *tradition or delivery*, the *titulus* or investitive incident consists: First, in an intention on the part of the alienor to alien; secondly, in such a *causa*, consideration, inducement, or motive to or for the alienation, as the law holds to be just or sufficient.

The tradition is *merely preappointed evidence of the titulus*; though in consequence of its being esteemed necessary evidence, it is often treated as part of that *titulus* (or as a mode of acquisition superinduced upon it), and is sometimes (for that reason) *feigned* to have taken place.

Instances in which property passes by force of the *titulus*, evidenced through some declaration of intention *other than* tradition, actual or symbolical.

The *Causa* or consideration may be insufficient to sustain the disposition *as against the alienor* himself (e.g. : fear of violence; fraud; which last may vitiate a consideration otherwise good); Or, *as against third parties* (e.g. : a gift, as against creditors).

Tradition seems to have been confounded with *Modus acquirendi*, on account of its having been preappointed and *conclusive* evidence of *titulus*; until (with the advance of civilisation) the real nature of the transaction came to be scrutinised.

Same virtue attributed to the English *feoffment* and *livery*. (Blackstone, vol. ii.)

Absurdity of presuming, not the *titulus*, but the tradition to be the evidence.

Evidentiary Instruments and other forms. Interpretation of, etc.

Preappointed evidence, actions, etc.; general notions of, as preliminary to dispositions.

Registration.

(To be postponed to the end of *præscription*.)

Limits to the application of registration, arising out of the nature of the subject.

Disposition.

'Disposition' may be conveniently used as a generic expression for any act by which a person assumes to transfer, or promises to transfer, his real or assumed Right, or any part of

it, to another. The species will be Voluntary Alienation and Contract.⁶

Dispositions of which the consequences are predetermined (by the law) absolutely: and those of which the consequences (subject to restrictions) are left to the will of the parties. In which last case, consequences (to take effect in default of expressed intention by the parties) are marked out by the law or not.

Dispositions are *valid or invalid*:—If valid, the *consequences* are predetermined by the law, or they are left to the appointment of the parties:—If left to the appointment of the parties, *provisional dispositions* (dispositions to take effect in default of such appointment) are laid down, or not. If there be no appointment by the parties, where there are such provisional dispositions, these take effect—1st: Either because they may be presumed to have been intended; or, 2ndly: Because they are the best—generally speaking—that the parties could have made; or, 3rdly: Because it must be presumed that they did not intend nothing, and here is a something which they might have meant. On the first and third suppositions, these provisional dispositions are indeed nothing more than dispositions of the *parties* (tacitly referring to consequences which they meant to adopt, and) which, by reason of known rules of law, it is not necessary to express. If there be no intelligible appointment by them, nor any in their default, the transaction is without effect.

By reason of the invalidity of certain dispositions, and of the necessity of making provisional dispositions, a large space is in every Law occupied with them. See 'Combinations of *Jus in Re*,' etc.

Termination of Rights.

The modes in which *jura in rem* terminate, are not described in the Institutes of Gaius or those of Justinian.

It is necessary to describe the end explicitly and apart, only in those cases in which the end is not involved in a mode of acquisition.

[*Dereliction*. See Blackstone, vol. i. p. 9; Mühlenb. vol. i. p. 236; Hugo G, p. 238; Mackeldey, vol. i. § 186; vol. iv. cap. ii. § 272.]

Jura in Re are further divisible into—

⁶ See list of alienations, contracts, and combinations of both, in Bentham, *Traité*s, etc., vol. i. p. 390.

1st. Such as are available against all the world (or against men indefinitely and without exception);

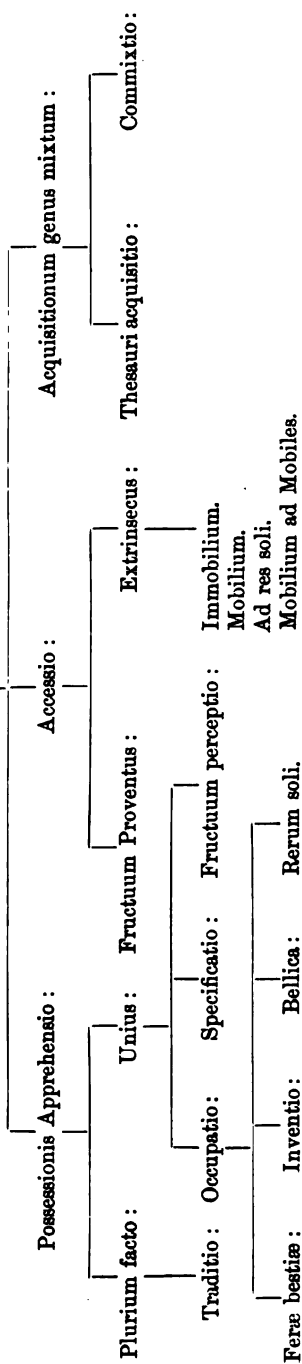
2ndly. Such as are available against all the world with certain definite exceptions. The first of these is also called Property: The second, Possession (must be distinguished from possession, *titulus*); and is to property in the last sense, what property saddled with a *servitus* is to *jus in re* unsaddled with a *servitus*. Under this, therefore, may be included the *jus in re* acquired by a purchaser in Equity, as against all subsequent purchasers *with* notice; or rather as against *all* mankind except a purchaser *without* notice, etc.

List of Authorities referred to in this Lecture.

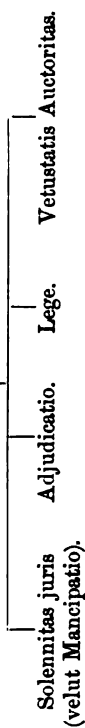
| | |
|--------------|----------------------------|
| Blackstone. | Heineccius. |
| French Code. | Gaius. |
| Mackeldey. | Institutes. |
| Mühlenbruch. | Table II. (<i>post</i>). |
| Hugo. | Falck. |
| Bentham. | Savigny. |
| Thibaut. | |

TABLE COPIED FROM THE MARGIN OF MÜHLENBRUCH, vol. ii. p. 245, cap. 2 : 'De Dominio.'

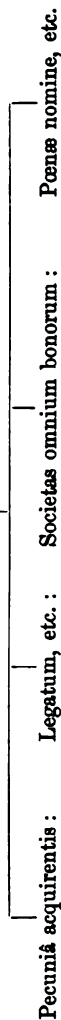
ACQUISITIONES EX JURE GENTIUM.



JURE CIVILI.



LEGE SIMPLICITER.



FROM 'LOOSE PAPERS,'

Containing Heads of Lectures or Sections.⁷

CONTRACTS.

In the proper sense of the word, a Contract is a *promise*, and begets only *jus ad rem* against the promisor: *i.e.* a right to an act, an endurance, or a forbearance on his part.

(Gail Comm. lib. ii. § 85. *Traité*s, etc. 272, vol. ii. p. 165. Table II., *post*, last note.)

Confusion of incidents which are not promises, or not purely so, with Contracts.

Consequences expressed by parties, and consequences annexed by law in default of such expression.

Consequences of Contracts upon third persons.

In the language of the English Law, 'Contract' is often limited to *mutual* promises; Bond and Covenant being the names applied to unilateral contracts.

(Bentham, *Traité*s, etc. vol. i. 289, and Fragment on Government.)

Covenant, in the Roman Law, a generic expression; in the English, the name of a species.

(Hobbes, *Leviathan*, chap. xiv.)

Bond, which etymologically is equivalent to obligation, is the name of a species of unilateral contracts, or rather, perhaps, of a formality necessary to the validity of it.

Nominate and innominate Contracts.

Most nominate contracts appear to be improper contracts: *i.e.* not to be productive of *Jus ad rem* purely.

Pollicitation.

Why a promise is binding (abstraction made of the interests of third parties). It binds, on account of the expectation excited in the promisee. For which reason a mere pollicitation (that is, a promise made but not accepted) is not binding; for a promise not accepted could excite no expectation. So of a promise obviously made in jest.

In enforcing contracts, the expectations of both parties must be looked to. Where the terms are expressed in writing, their

⁷ See p. 898, *ante*.

common agreement, contemplation, expectation (*i.e.* of the burthen undertaken by one, and the advantage expected by the other), is to be collected from that.

In the Stipulation, the sense in which each party contracted was expressed apart, in order to render a doubt impossible.

Where language is not employed, the common meaning of the parties is collected from the peculiar facts of the case, and from the consequences attached by the law (or usage) to contracts of the sort. Which consequences are either positive or dispositive: *i.e.* to take effect whether the parties wish them or not, or in default of their making other provisions of their own. And in either case they must be understood to contemplate these consequences.

Solemnities annexed to Contracts.

Their ends, as regards the parties, are two. 1. To provide evidence of the existence and purport of the contract, in case of controversy. 2. To prevent inconsiderate engagements.

Many of these solemnities answer (and were intended to answer) both purposes, such as Bond, Covenant, Stipulation, etc. Others answer (or were only intended to answer) one. Such as the writing required by the Statute of Frauds.

Distinction between such solemnities as are merely evidence of a contract; and such as are evidence of a contract and of its terms.

Earnest, for instance, is merely evidence that a contract was made; its subject, its terms, etc. must be established by evidence *aliunde*: A bond, etc. perpetuates these last. So a Stipulation was evidence of the promise and of the terms.

In *Unilateral Contracts*, inconsiderateness is prevented by the unusual solemnity of the evidentiary incident annexed:—*E.g.* the sealing of a bond or covenant, the interrogation and answer in a Stipulation.

In *Bilateral Contracts* (by the Romans termed 'consensual,' by the English 'parol'), it is supposed to be prevented by the mutuality: each party contracting for his own pecuniary advantage; contemplating a *quid pro quo*; and therefore, being in that circumspective frame of mind which a man who is only thinking of such advantage naturally assumes. This solution will not indeed apply where the *Consideration* is past, or of small amount; but that this is only an inconsistent application of the doctrine, and that it arose out of the principle suggested, is clear, from the considerations afterwards suggested.

By *consensual* is meant, resting upon consent without solemnity; by *parol*, contracts which are not evidenced by writings in a certain shape and accompanied by certain solemnities.

In consistency with the *principle*, the doctrine of Lord Mansfield and Wilmut (in 3d Burrows, 1665) is the just one. The contrary opinion, however, is consistent with the actual law. To require *quid pro quo* where a solemnity analogous to that of a bond intervenes, seems to be absurd.

The doctrine of Lord Ellenborough, that 'there must not only be a consideration, but that it must be stated in the evidentiary instrument,'⁸ is pushing the deviation from the principle still further. (*Sed Quæ.*)

Quære: Whether, in cases of pure contract, the solemnities in question are ever intended for, or are applicable to, the protection of *third persons*?

In cases of mortgage, etc. Registration is applicable and applied; but only in respect of the subject over which the *jus in re* is given.

Since a contract gives no *jus in re*,⁹ registration, as regards the subject, could be of no use; for as the party who contracts to dispose of that subject may, if the transaction be really a contract, aliene to another before completion, and that other can retain (even with notice), registration would be nugatory. It is only where the other could not retain as against the former party, that registration is of use. By declaring that he shall retain (if there be no registry or notice in some other way), you make the right of the first acquirer conditional. But in the case of contract, he has no right, conditional or unconditional, as against third persons; and therefore, third persons need not any such precaution.

Contracts in Equity, which give *jus in re* as against all who have real or constructive notice, are, as against all such persons, alienations; though only contracts as against others. So far, therefore, as regards contracts, registration could be of no use, but in respect of the *person* of the contracting party. By knowing the nature of a man's engagements with others, I may make a guess at his ability to fulfil such as I may think of entering into with him. His, in case of *partnership*, has taken

⁸ Wain v. Walters, 5 East, 10.

⁹ With regard to the meaning of *jus in re*, see p. 960, *post*. Although the author there objects to this use of the expression, he may very well, in these notes for his own use adopt it as short for the expression '*jus in rem* over a specific thing.'—R. C.

place to a certain extent. But it seems to be of limited application.

The absence or presence of Consideration, how it affects third persons (as creditors or other claimants against the general means of the obligor).

Its absence as affecting third persons need not be considered where the contract is unilateral, and is not accompanied by such solemnities as are necessary to make unilateral contracts binding on the *promisor*. Not being binding on *him*, it is of course, and *à fortiori*, not binding on those who acquire rights from him.

But unilateral contracts, which would bind the promisor, are often void as against third persons, because they are without consideration; *i.e.* without valuable consideration; for, as we have often observed, *no* promise or act is without a consideration, inducement, or motive of *some sort*.

Analyse the different motives; and shew why a promise made for other than a valuable consideration is not, and ought not to be, good against those who have acquired rights out of transactions founded on such consideration.

Difference between the intensity of the expectations.

Danger of fraud. Danger of what would have the same effect, if rights acquired for valuable consideration could be defeated wholly or partially by inconsiderate engagements. Postponement of the claims of the industrious to those of the idle.

Difference between vicious consideration and want of consideration.

Where the consideration is vicious, the contract begets no obligation. Where there is a want of consideration, there is an obligation against the contracting party, provided certain solemnities are observed. 'Want of consideration' is an elliptical or abridged expression for 'want of *valuable* consideration.'

Why a contract (strictly so called) gives no right in re as against third persons, whether of property or right of possession.

The principle seems to be this: that for want of sufficient publicity (or what is deemed sufficient), the right of the obligor over the subject, and consequently his power of disposition, are apparently unaltered: the contract is not generally known. Third parties, therefore, afterwards acquiring by alienation (to which more publicity is, or ought to be, attached), would be disappointed in their well-founded expectations, if their right could be defeated by a right arising out of a transaction of which

(as is assumed) they had no, or very inferior, means of ascertaining the existence.

Upon this principle, a transaction accompanied by such evidentiary solemnities that at law it would be merely a contract, is, in equity, an alienation (*i.e.* gives a *jus in re* which may be classed with rights of possession), against all who do not afterwards acquire by a conveyance without notice of the contract. Equity looks at the *purpose* of the solemnity which is attached to a conveyance. That such solemnity imparts a knowledge of the disposition to third persons, is merely a presumption; that in the absence of it no such knowledge is imparted, is also a mere presumption; and since this limited presumption will not hold if there be evidence aliunde (*i.e.* either actual evidence, or *presumptio juris* of another sort—constructive evidence), that such knowledge was had, Equity, in these cases (whether usefully or not, is a question), overrules the presumption, and gives the subject to the obligee, as against all who are proved to have had that notice which (for want of a conveyance) it is only *presumed* that they had not.

Cases in which Equity does not give jus in re against acquirers with notice, but defeats an existing jus in re in favour of acquirers without notice. This is also resolvable into principles of evidence.

Where the contract is accompanied by some incident which is presumed to give general notice of the disposition, it changes its character and becomes an alienation, *e.g.* a sale with delivery, actual or symbolical.

In these cases there is *jus in re* given to the obligee (*i.e.* a power of making a valid disposition, and of retaining as against the obligor or subsequent acquirers from him), though for many purposes (such as that of rescinding the disposition and recovering the equivalent—charging the obligor with the loss of the subject, etc.), the contract is still *in fieri*, as between obligor and obligee. Stoppage *in transitu* is a good illustration. The disposition as an *alienation* being incomplete,¹⁰ the seller, by preventing its completion, prevents the right of the creditors from attaching.

Wherever a disposition given *jus in re* (*i.e.* a right on the part of the vendee or those who take from him, against acquirers from the vendor), the disposition is manifestly an alienation. If it be not, there are no means of distinguishing the one from the other. The ambiguity in truth arises from a very gross mistake,

¹⁰ But, according to English law, if tract of sale. Therefore in English law the subject be specific, the alienation is *stoppage in transitu* is an anomaly. See looked upon as completed by the con- note, p. 374, vol. i. *ante*.—R. C.

viz. *confounding evidentiary incidents with dispositions*. Because certain incidents at law give no *jus in re* (and therefore are contracts), *ergo*, the dispositions clothed with these incidents are still contracts, though in Equity they have a different effect.

QUASI-CONTRACTS AND QUASI-DELICTS.

STRICTLY, Quasi-Contracts are acts done by one man to his own inconvenience for the *advantage* of another, but without the authority of the other, and consequently, without any promise on the part of the other to indemnify him or reward him for his trouble.

Quasi-Con-
tracts
strictly
what?

Instances: *Negotiorum gestio*, in the Roman Law: Salvage, in the English.

An obligation arises, such as *would have arisen* had the one party contracted to do the act, and the other to indemnify or reward. Hence the incident is called a 'quasi-contract;' i.e. an incident, in consequence of which one person is obliged to another, *as if* a contract had been made between them.

The basis is, to incite to certain useful actions. If the principle were not admitted at all, such actions would not be performed so often as they are. If pushed to a certain extent, it would lead to inconvenient and impertinent intermeddling, with the view of catching reward. Whether it shall be admitted, or not, depends upon the nature of the act:—i.e. its general nature; since, without a general rule, the inducement would not operate, nor would the limitation to the principle be understood. Acts which come not within the rule, however useful in the particular instance, must be left to benevolence incited by the other sanctions.

(See 'Sanctions,' *post*.)

But quasi-contract seems to have a larger import;—denoting any incident by which one party obtains an *advantage* he ought not to retain, because the retention would damage another; or by reason of which, he ought to indemnify the other. The prominent idea in quasi-contract seems to be an *undue* advantage which would be acquired by the obligor, if he were not compelled to relinquish it or to indemnify.

Quasi-delict:—an incident by which *damage* is done to the obligee (though without the negligence or intention of the obligor), and for which damage the obligor is bound to make satisfaction.

It is not a delict, because intention or negligence is of the essence of a delict: it being useless to apply a sanction where the will is passive.

The distinction between quasi-contract and quasi-delict, seems to be useless. In neither case is there either contract or delict. They are merely arranged under these heads, because there is an obligation (*stricto sensu*), as there would have been if there had been a contract or a delict.

Therefore *one fiction suffices*: and the rational way of considering the matter is, to look at the *incident* as begetting an obligation; and to treat the *refusal* to make satisfaction, or to withhold the advantage, as a delict; *i.e.* as a breach of that obligation.

The terms are merely a sink into which such obligatory incidents as are not contracts, or not delicts, but beget an obligation *as if, etc.* are thrown without discrimination. And this is the rational view which Gaius has taken of the subject, in a work from which an excerpt is contained in the Pandects.¹¹

Note.—Many incidents which are treated as quasi-contracts or quasi-delicts are, in truth, contracts or delicts; or need not be thrown into this common receiver, because they may be treated of conveniently elsewhere. Examples: 1°. The refusal to pay money received under a mistake, appears to be, not a quasi-contract, nor a quasi-delict, but a delict; there being intentionality. 2°. *Evictio*, which is a tacit contract. 3°. The obligation of the *hæres* to pay legacies; which it is absurd to refer to a quasi-contract, and not to the will, etc.

In the English Law the above terms do not occur; there the obligation is said to arise out of a contract or promise which the law implies. But the fiction is the same.

Demand necessary to support an action on jus in re.

If there be no delict without intention or negligence, quasi-delicts (like quasi-contracts) are merely sources of obligations, the *refusal to fulfil which* is properly the cause of action. Thus, the fact of my having received money through a mistake, is not a delict; but begets an obligation to repay that money or an equivalent. And the refusal (express or indicated by conduct) to repay, is the immediate cause of action: *i.e.* is a delict.

(*Qu'*. Or the action may be considered a vindication.)

¹¹ It is remarkable that Lord Stair, who may well be called the *Gaius* of Scotch jurisprudence, adopts a similar arrangement, and classes both under one head, which he names 'Obediential obligations'—duties to which, namely, we are bound by the will of God without our own engagement or consent, and which include the primary duties arising from the domestic conditions.—R. C.

In those cases in which a consideration has *failed*, there is a breach of accessory contract.

So, if I refuse to make compensation for damage done by my servant (without intention or negligence on my part) there is a delict; but, before refusal, an obligation to make such compensation. (*Quæ*. Whether demand be necessary to sustain the action?)

It would appear, therefore, that every Right of Action arises out of a delict: *i.e.* a violation of some positive or negative obligation: And all such obligatory incidents, as amount to a cause of action without demand and refusal, are not quasi-contracts or quasi-delicts, but breaches of contract or violation of *jus in re*.

In quasi-contract, the prominent idea seems to be the advantage derived by the obligor (though inconvenience must, of course, have been sustained by the obligee).

In quasi-delict, the prominent idea is the damage suffered by the obligee; any advantage which may have accrued to the obligor being accidental to the cause of obligation. But in many cases the advantage and damage so suppose one another that it is difficult to determine the class. As *solutio indebiti*. Hence, '*ex variis causarum figuris*.'

If the terms are to be retained, it would be better, perhaps, to limit 'quasi-contract' to incidents in which a service has been rendered by the obligee, and on which, therefore, it may be presumed that the obligor (if conscious and capable of contracting) would have purchased the service by a promise to requite, etc. And to call all other incidents 'quasi-delicts.'

Note.—Wherever there is a promise, expressed or implied (*i.e.* to be inferred from the words, or from the position, or conduct of the obligor, previous to the completion of the obligatory incident), that incident is not a quasi-contract, but a genuine contract. And wherever there has been negligence or intention, immediate or remote, on the part of the obligor, there is a genuine delict. It would seem, therefore, that damage done by the intention or negligence of servants, by vicious cattle, etc. of the obligor, ought to be rather ranked with delicts: for there is a degree of negligence in employing such servants, or in keeping such cattle, etc. In short, where the damage is not the consequence of some incident which prudence could not prevent, there is always room for applying a motive to the will; and, therefore, the incident may be classed with delicts.

(See 'Sorts of Civil Injuries,' *post*.)

Limiting quasi-contract to services without instance and promise, and quasi-delict to damage without intention or negligence, immediate or remote,—there seems no reason for the use of the two terms; either being alike applicable by the same analogy: *i.e.* an analogy not of obligatory incidents, but of consequent rights and obligations. Neither a quasi-contract nor a quasi-delict is like either a contract or a delict; but the *consequences* of *either* of the former, are like the consequence of *either* of the latter; *i.e.* in begetting *jura ad rem*.

Blondeau seems to mistake the meaning of quasi-delict. The cases which he has cited as quasi-delicts are delicts: for there is intention or negligence. Quasi-delicts, in truth, are not *violations* of rights at all; but sources of *jura ad rem*, the refusal or omission to satisfy which, is a delict.

If an incident beget *directly* an action, it should clearly be ranged with delicts, and not with quasi-contracts or quasi-delicts.

Perhaps all incidents not contracts, which imply neither negligence nor intention on the part of the obligor, but which yet beget an action without refusal or omission to satisfy, etc. should be called quasi-delicts, being like delicts in *directly* begetting an action, but unlike them in respect of the absence of negligence and intention.

And all incidents not contracts, which imply neither negligence, etc. but which only beget an obligation, the refusal or omission to satisfy which, is the direct cause of action, should be called quasi-contracts: they being like contracts (rather than delicts), inasmuch as they engender an obligation which in itself supposes no right of action, but only begets an action on *breach*.

If this be so, quasi-delicts should be classed with 'Sanctionative Rights and Obligations.'

Gaius makes no distinction between delicts and quasi-delicts, though he adverts to quasi-contracts.

Quasi-contracts and quasi-delicts, are not the only cases in which the name of one incident is extended to another, by reason of a resemblance between the rights and obligations which they respectively engender. Another instance, is the extension of the term 'purchasers for valuable consideration,' to certain parties who are entitled under marriage settlements.

The confusion entirely proceeds from the want of a generic expression by which these incidents can be bundled up together.

And note; the same want, instead of leading to the extension

of a narrower, sometimes leads to the limitation of a wider : as in the instance, *Rights arising by operation of Law* ; as if all rights did not so arise, and as if it were possible to distinguish this narrower class of rights by a term which is common to all.

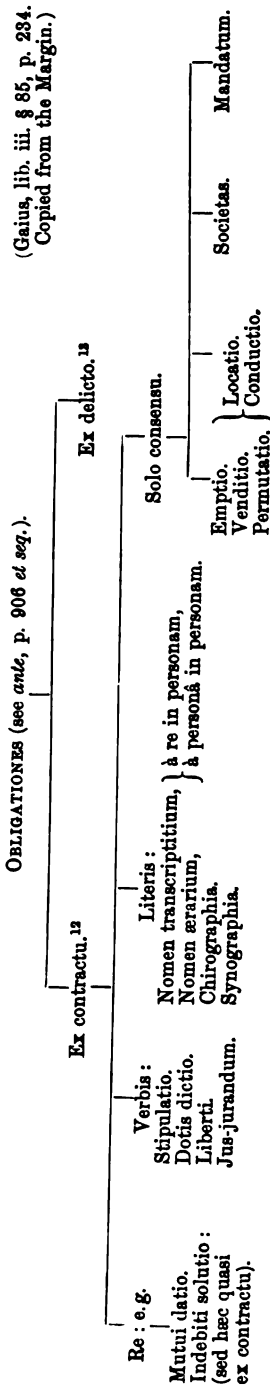
Tendency to confound tacit contracts with quasi-contracts.

(Give instances :) This confusion is more likely to arise amongst English lawyers than others, on account of their wanting a generic name (which, bad as it is, the Romans have) for marking this sort of obligatory incidents.

Origin of the classification of spontaneous services, and of damage without intention, etc. with contracts and delicts.

1st. The want of generic names.

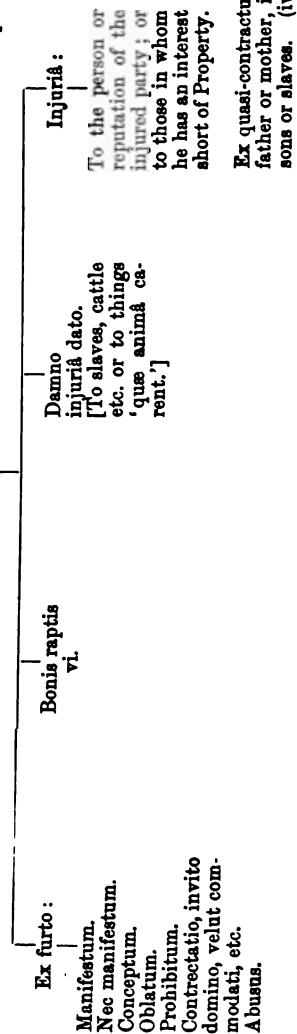
2nd. The extension to the former of the remedies previously annexed to the latter.



(Gaius, lib. iii. § 85, p. 234.
Copied from the Margin.)

(Gaii Comm. iii. § 225, p. 297.
Copied from the Margin.)

Obligaciones ex delicto.¹³



¹² 'Contract' here comprises quasi-contract.

¹³ 'Delict' (though it sometimes means any culpable act or omission) is commonly confined to violations of absolute rights (*jura in re*) in the largest possible sense.

JURISPRUDENCE.

TABLES AND NOTES.

IN the Preface (p. 24, vol. i. *ante*) to this work, I mentioned the Tables which Mr. Austin drew out and distributed to the members of his class. I also gave, in his own words, his account of them, and of his purpose in constructing them. I added, that they were lamentably incomplete, but that I was not without a faint hope that some of the materials destined for the construction of the missing Tables might be found among his papers. I have clung to this hope with a tenacity which there was little to justify; but after the most minute search and anxious inquiry, I am compelled to relinquish it.

Notwithstanding the incontestable value of the following Tables and Notes, it is not without infinite pain that I submit them to the public in their actual state; especially since I have the full persuasion that some at least of those which are wanting were either prepared or in course of preparation. As I always corrected the press with him, I ought to be able to recollect exactly what were printed, but several circumstances, which, for his justification, it may not be impertinent to mention, tended to efface any distinct memory of them from my mind. After the close of his Lectures in 1832, he was in such a state of suffering and depression that my only solicitude was to keep everything out of his way that could remind him of his abortive projects and frustrated hopes; and I carefully avoided all mention of his Lectures. The copies of the Tables, excepting the few he had distributed, were left in the hands of the printer, and remained there till very recently.

In the Preface I have mentioned the several occupations in which Mr. Austin engaged. To these successively he devoted all the time and thought of which incessant attacks of illness left him master; and after eight years passed in a fruitless and exhausting struggle, he was compelled to abandon it, and to seek some mitigation of his sufferings abroad.

Thus there never was a time at which he could have been urged to complete this laborious work with the smallest chance of success. Nor was it ever alluded to, till within the last few years, when he could talk with calmness of his failures and disappointments. He

one day said to me, 'I have been looking over those Tables of mine, and I may say to you that I am really surprised at my own work.' And he went on to describe what had excited in him the rare emotion of self-applause. Thus encouraged, I did venture to express my ardent desire that he would finish them, and return to the work in which he acknowledged his own mastery. But he only replied, 'It is too late—At that time I had it all before me. The time is over. Besides, who would care for them ?'

This was the last, I believe it was the only time, we ever spoke of them, and it was decisive.

And thus, after the lapse of thirty troubled years, I can do nothing but either suppress what competent judges deem so conclusive a proof of his ability and learning (and what, above all, he himself thought admirable), or give the fragments which exist of the complete structure he had planned.

It appears clear from the numerous references to them which will be found in the following pages, that the missing Tables were in existence. Whether any manuscript was left in the printer's hands, and, in so long a lapse of time, destroyed, or whether he himself, dissatisfied, as he was so apt to be, with what he had done, destroyed it, it is impossible for me to conjecture. I have carefully examined every portion of the manuscripts. I find a great number of notes which were probably intended to be used in the completion of this work, but nothing that can be applied to that purpose by any hand but his.—*S. A.*

TABLE

The Arrangement which seems to have been in-

JUS (law) PUBLICUM :

('Quod ad *Statum Rei Romanæ*—ad *publice utilia*—*spectat* :
Quod in *sacris*, in *sacerdotibus*, in *magistratibus* consistit.')

JUS (law) *quod ad PERSONAS*
pertinet : (otherwise, *De PERSONIS—De JURE*
Personarum—DIVISIO Personarum : ἡ τῶν
προσώπων διαίρεσις—De CONDICIONE Homi-
num—De STATU Hominum—De Personarum
STATU.) [*§* *Notz* 4.]

JUS (law) *quod ad RES*
pertinet : (otherwise *De*
REBUS.) [*§* *Notz* 5.]

The subjects, or matter, of which de-
partment appear to be the following :
viz.—

DOMINIUM (in the large signification) :

A class of Rights (their corresponding duties being
implied) which contains the following *genera*, *viz.*—

DOMINIUM *rei singulæ* : (or
Dominium, in the strict ac-
ception. Otherwise styled
PROPRIETAS ; otherwise,
IN RE POTESTAS.)

JURA, sive JURA IN
RE alienâ : *velut*
Servitus, Jus Pigno-
ris, etc.

DOMINIUM *Rerum per*
UNIVERSITATEM acqui-
sitarum : *velut Heredi-*
tatis, Dotis, Peculii, etc.

JUS POSSESSIONIS :

JURIS in *re alienâ*
QUASI POSSESSIO.

[For the *§* *Notz* to this Table, see the next page.]

I.

tended by the Roman *Institutional* Writers. **Note 1.**

JUS (law) PRIVATUM :

('Quod ad singulorum utilitatem—ad privatim utilia—spectat.') [**Note 2.**]

Containing—

JUS (law) quod ad ACTIONES

pertinet : (otherwise *De ACTIONIBUS.*) [**Note 3.**]

A department exclusively conversant (according to the intended arrangement) about *Civil Procedure*; but (as it is given by Gaius, and also by his imitator Justinian) including the description of a few rights and obligations which properly are *substantive*.

OBLIGATIO (in the correct signification) : [**Note 6.**]

A class of Rights and Obligations which contains the following genera, viz. :—

OBLIGATIONES ex Contractu et quasi ex Contractu :

Which department relates to

1. *Obligations* arising immediately from contracts and quasi-contracts (— *Primary Obligations*—Obligations not founded on injuries, delicts, or wrongs).

2. *Injuries* consisting in the non-performance, or in the undue performance, of those primary obligations : e.g. *Mora*.

3. *Obligations* arising immediately from those injuries, though *mediately* from the primary obligations of which those injuries are violations : e.g. *Liabilities* on an Action ex contractu, with the corresponding *Right of Action* residing in the injured party.

OBLIGATIONES ex

Delicto :

Which department relates to

1. *Delicts*, in the strict signification of the term : i.e.

Damage intentional or by negligence ('*dolo aut culpa*'), to *absolute* rights—to *jura in rem* (in the largest import of the phrase)—to *jura quæ valent in personas* GENERATIM (as opposed to *jura quæ valent in personas* DETERMINATAS). (See Table II. note 3.)—

As examples of *Delicts*, in the strict signification of the term, may be mentioned, Assaults, and other offences against the body; Libels and other offences against reputation; Thefts considered as civil injuries; Forcible dispossession; Detention *malæ fide*, from the dominus, or proprietor of the subject; Trespass upon another's land; Wounding, or otherwise damaging, his slaves, cattle, or other movables.

2. The *Obligations*, incumbent upon the *injuring* parties to restore, satisfy, etc.; with the corresponding *Rights of Action*, etc. which reside in the *injured* parties.

OBLIGATIONES

quasi ex Delicto. [**Note 7.**]

Whether the Law of *Crimes*, of *Punishments*, and of *Criminal Procedure*, fell within the plan of the Roman *Institutional* writers, seems to be doubtful. [**Note 8.**]

NOTES TO TABLE I.

TABLE I.
Note 1, 2.

[**Note 1.**] See GAII *Institutionum Commentarii* IV; ULPIANI *Libri Regularum Singularis Fragmenta*; JUSTINIANI *Institutiones* ('ex omnibus antiquorum Institutionibus, et præcipue ex Commentariis GAII tam *Institutionum* quam *Rerum Quotidianarum*, aliisque multis Commentariis, compositæ').

The Arrangement of Justinian's Institutes (or, rather, of the earlier Institutes from which they were copied or compiled), is a *systematic*, or scientific one: that is to say, derived from distinctions lying in the *matter* of the treatise. Thus, the Roman Law (the matter of the Institutes) is divided, in respect of its *sources*, into Written and Unwritten, etc.: in respect of its *subjects*, into Law of Persons (*i.e. special* or *particular* law), Law of Things (*i.e. the general* law of *substantive* rights and obligations), Law of *Procedure*, etc. But the arrangement (if such it can be called) of his Code and Digests, is an *historical* one. Instead of being founded upon distinctions lying in the *matter* of the compilations, it was taken from a circumstance purely extraneous and accidental: namely, the order or series (consecrated by reverence for antiquity), in which the various branches of the Roman Law had been modified, as occasion prompted, by the Edict of the Prætors. See the Constitution 'De Conceptione Digestorum,' in which the Emperor instructs Tribonian 'in libros et titulos materiam *digerere*, tam secundum Nostri constitutionem Codicis, quam EDICTI PERPETUI *imitationem*.' It is scarcely necessary to add, that each of these clumsy compilations is the merest chaos.

In the Table here submitted to the reader (which has been abstracted from the three treatises mentioned above, and also from the corresponding portions of the Digests or Pandects), the *terms* of the *Classical Jurists* are given exactly. With a view to the study of these admirable writers (who are incomparably the best teachers of the Roman Law), this is a matter of the highest importance. Such a multitude of new, and, in some respects, preferable expressions, has been imported into the system by the later Civilians, that those who have only studied it in the writings of these last, scarcely know it again when they mount to the original sources.

[**Note 2.**] For the distinction between *Jus publicum* and *Jus privatum*, see Inst. lib. i. tit. i. § 4; Dig. ib. i. tit. i. Tit. i. l. 1. § 2.—And see below, Note 8. It seems that the Elementary writers commonly confined themselves to the latter. For

Justinian's Institutes briefly *indicate* the distinction, and then immediately subjoin '*Dicendum est igitur de jure privato.*'

TABLE I.
Note 2-6.

[**Note 3.**] The Arrangement of Private Law exhibited in the Table above is formally announced by Gaius (i. § 8. '*De Juris Divisione*'), and also by Justinian (Inst. i. 2. § 12): And, in spite of the opinion now prevalent in Germany (see Tab. III.), it seems to be the arrangement which they intended and actually observed. Their adherence to it may be traced in the Institutes of Gaius, and is obvious in those of Justinian.

Compare the following places of the latter: Inst. i. 2. § 12.—ii. 1. in princip.—ii. 2. § 2.—ii. 5. § 6.—iii. 12, '*De Obligationibus*,' in princip.—iv. 6, '*De Actionibus*,' in princip.

For the scope or purpose of this Arrangement, see Table II. note 2.

[**Note 4.**] These various expressions for the Law of Persons may be found in the following places:—Gaii *Comm.* i. §§ 8, 9.—Inst. i. 2. § 12: t. 3. in pr.—Dig. i. 5. ('*De Statu Hominum*') l. 2.—Theophilus 4. 6. pr.

[**Note 5.**] Gaii *Comm.* ii. § 1.—Inst. ii. 1. in principio.

In the language of the Roman Lawyers, the term '*Res*' has various meanings; and of these, the two following demand particular notice. It means, first, Things, Persons, Acts (or Forbearances), as *subjects* or *objects* of rights and obligations:—'*materia juri subjecta*'—'*in quâ jus versatur*'—'*ea quæ jure nostro afficiuntur*'—'*quæ tanquam materia ei sunt proposita.*' Or it means, secondly, Rights and Obligations themselves:—'*res incorporales*'—'*ea quæ in jure consistunt:*' velut '*jus hereditatis*,' '*jus utendi fruendi*,' '*servitutes*,' '*obligationes* quoquo modo contractæ.'

See Inst. ii. 2. § 2.—If this passage had been well considered, those differences about the arrangement of the Institutes, which are referred to in Note 3, would scarcely have arisen. See Table III.

For the import of the expression '*Jus quod ad Res pertinet*,' see Table II. note 2.

[**Note 6.**] *Dominium* (in the large signification) and *Obligatio* (in the correct signification) are synonymous with the *Jus in Rem* and *Jus in Personam (determinatam)* of numerous modern

TABLE I.
Note 6.

writers upon the Roman Law. For the import of which distinction, see Table II. note 3.

By the Classical Jurists, 'Obligation' is never employed in that large generic sense which it has acquired in subsequent times. In the language of these writers, it has commonly the following meanings.

1°. It signifies the *Obligation* which answers to a Right *in personam*.

2°. Inasmuch as they had no name *specifically* belonging to this last (rights of every class being embraced by the word *jus*), they used the term 'Obligation' to denote that Right (*in personam*) with which the Obligation correlates.

3°. It signifies the *Right (in personam)* which resides in the party entitled, *with the Obligation* which is incumbent upon the opposite party: 'Vinculum inter utrumque.'

It is remarkable that a similar ambiguity (with a swarm of others) sticks to the term *Jus*. Thus, 'in omne *Jus* defuncti succedere,' is to succeed to the *obligations* as well as to the *rights* of the deceased. So of the German word *Recht*; in the legal, as well as in the popular, language of the Middle Ages. And so, in our own country, when a man is *obliged* to do a thing, it is not unfrequently said 'that he has a *right* to do it'—an expression at which we laugh, but which, beyond a doubt, is good Saxon English.

As the Roman Lawyers had no *specific* expression for Rights against *determinate* persons, so had they no term *appropriated* to those *general* Obligations which correspond to rights *in rem*. A Roman Lawyer, speaking of such an obligation, would have used the generic term *Necessitas*; or, less correctly, *Officium*;—the former signifying obligations which are imposed and sanctioned by *law*; the latter denoting, properly, those *religious* and *moral* obligations, which, as wanting that cogent sanction, are frequently styled 'imperfect.'

Consequently, the language of the Roman Lawyers stood (*nearly*) thus:

1°. For rights (universally,) they had '*Jus*:' for rights *in rem* (generally), '*Dominium*' (in its loose signification): for rights *in personam*, '*Obligatio*.'

2°. For obligations or duties (universally) they had '*Officium*' and '*Necessitas*:' for the *special* obligations which answer to rights *in personam*, '*Obligatio*.'—For the *general* duties or obligations which answer to rights *in rem*, they had no *specific* expression. But since obligations of this class were *never* denoted by '*Obli-*

gatio,' and since obligations of the other class were *always* denoted by it, '*Officium*' or '*Necessitas*,' when *opposed* to '*Obligatio*' supplied the defect.—For a closer examination of the matter, see Table II. note 3.

TABLE I.
Note 6.

[What follows, to the end of the Note, was found among 'Loose Papers.' It is marked 'Note 6, to Table I,' and is the only fragment to which a place is distinctly assigned.—*S. A.*]

[The Latin *Jus* (not synonymous with Law) sometimes means Right as opposed to Obligation. Sometimes, however, it is used collectively, and denotes right *and* obligation, or obligation alone. '*Succedere in omne Jus defuncti*,' is to succeed to his obligations as well as to his rights.

The word 'Obligation' (*stricto sensu*) has also a double meaning. Sometimes it means the obligation which corresponds with *Jus ad Rem*; sometimes it means the right of the one party, as well as the obligation of the other. Thus the party who gains a right by a contract is said to acquire an obligation; *i.e.* a right against the party who is bound by the obligation. Thus, also, the theory of the Rights and Obligations which arise out of contracts, and of the rights and obligations which resemble these, though they originate in other incidents, are treated in the Institutes, Gaius, etc. under the title of Obligations: an expression which denotes the rights of the parties entitled, as well as the obligations of the parties who are bound.

The French word '*Engagement*,' which, though it properly mean not an obligation, but an obligatory incident of a certain kind (*e.g.* a contract), also means obligation, and is used by certain French writers as a collective expression for rights and obligations.

In the German, *Rechtsverhältniss* (a relation arising out of law) is also a generic name for right *and* obligation. Sometimes it denotes right *or* obligation; but then it always denotes the right *or* obligation as related to the obligation *or* right. It denotes the one and connotes the other.

An objection to these uses of *Jus*, *Obligatio*, and *Engagement* is, that the words thus used are ambiguous, and that when we want to discriminate between right and obligation, we must constantly annex to the term a declaration of the sense in which we mean to use it.

But there is another objection of a more general nature: an objection which applies equally to *Rechtsverhältniss*: namely, that each of these terms (used collectively) supposes that every

TABLE I.
Note 6.

right supposes an obligation;—that every obligation as well as every right is relative; that as the existence of a party invested with a right supposes the existence of one or more subjected to a corresponding obligation, so the existence of a party subjected to an obligation must suppose that some other party is clothed with a corresponding right. This, however, as we have already shown, is not true. There are absolute obligations, although there are no absolute rights.

The English language has this advantage, that though its vocabulary of leading terms is scanty, they are precise and unambiguous;—Law—Right—Obligation.

'*Befugniss*' and '*Pflicht*' seem to denote right and obligation in abstract, but sometimes the same in concrete; '*Recht*' and '*Verbindlichkeit*,' the converse: *i.e.* more commonly in concrete, but sometimes in abstract.

'*Forderung*' (which corresponds with the Latin *Debitum* in its largest sense) denotes that which is to be done, positively or negatively, in consequence of the obligation; which last is rather the '*vinculum*.'

'*Officium*' is moral duty or obligation in the largest sense.

'*Necessitas*' (which rarely occurs) is legal duty or obligation, also in the most extensive meaning of the word obligation.

'*Obligatio*' is a species of '*Necessitas*.' *i.e.* Obligation limited to a determinate person or persons. A specific name for the '*Necessitas*' which corresponds with *Jus in rem* is not to be found.

In German there are single names for the party having a right, and for the party subjected to an obligation. In other languages, circumlocution must be resorted to. The English '*entitled*' applies only to the first, and only denotes it in an indirect manner.

Right, Obligation, Duty (*Devoir*, *Officium*),—with their corresponding expressions, 'it is, or is not *right* to do such an act,' 'such an act ought, or ought not to be done;' 'such an act is right,' 'such an act is a duty,' etc.—are perfectly equivalent expressions; as denoting conformity with a rule (or rather performance or observation of the obligation which the rule prescribes).

Sometimes they simply denote approbation of some rule of conduct or of some act; as, 'Law as it *ought* to be.'

Sometimes 'ought' (and *devoir*, the verb) denote, like Law, conformity with *any* established order of incidents: as 'such an event ought to (or should, or must) have happened, on such and such suppositions.'

The metaphorical sense in this case differs from that in the case of Law only to this extent: that whereas the metaphorical 'Law' denotes the customary order, 'ought' denotes the metaphorical obligation which that law is feigned to have imposed. Observance of a law, or of the obligation which that law imposes, are equivalent expressions; each being causes of the uniformity which it is intended to indicate.]

TABLE I.
Note 6-8.

[**Note 7.**] The distinction between Obligations *ex Delicto*, and Obligations *Quasi ex Delicto*, seems to be superfluous and illogical. Obligations *Quasi ex Delicto* arise from two causes:

1°. Damage to the right of another by one's own *negligence* (*culpâ, imprudentiâ, imperitiâ*):

2°. Damage to the right of another by some third person for whose delicts one is liable (e.g. 'filius in potestate,' 'servus,' 'aliquis eorum quorum operâ exercitor navis aut stabuli navem aut stabulum exercet'). Cases of the former sort fall within the notion of *Delict*; and many such cases are actually ranked with Delicts in the *Lex Aquilia* (one of the principal sources of the Roman Law for that department of it). In cases of the latter sort, the class of the obligation varies with the nature of the ground upon which the liability is founded. If the mischief be caused, though remotely, by the *negligence* of the party obliged (e.g. 'si aliquatenus culpæ reus sit, quod operâ malorum hominum uteretur'), the case, as before, falls within the notion of *Delict*. And supposing that the party obliged is clear of intention and negligence, his obligation should be referred to that miscellaneous class, which are said, by analogy, to arise from (*quasi*) *Contracts*.

[**Note 8.**] The Institutes close with a short Title 'De Publicis Judiciis,' which only includes a *species* of Criminal Procedure, together with the Crimes and Punishments to which that species was appropriate.

See the Title in question, and also the following places in the Digests: xlvii. 1, 'De Privatis Delictis,' l. i. 3.—tit. 2. l. 94.—tit. 10. l. 45.—tit. 11, 'De Extraordinariis Criminibus.'—tit. 20. l. 1, 2.—tit. 23, 'De Popularibus Actionibus.'—xlviii. 1, 'De Publicis Judiciis,' to tit. 3, inclusive.—tit. 16, to the end of the Book, and especially tit. 19, 'De Pœnis,' l. 1. § 3.

It would seem that this Title in the Institutes is not a member or constituent part of the work, but rather a hasty and incongruous appendix added on as an after-thought. For, first,

TABLE I.
Note 8.

instead of expounding the subject in a systematic manner, it merely touches ('per indicem') a *fragment* of the subject. Secondly, It appears that Criminal Law was looked upon by the Roman Jurists as properly forming a department of *Jus Publicum*: And *this*, it is most probable, was not included in the Treatises from which Justinian's Institutes were copied or compiled.

See above, Notes 1 and 2.—Whether a similar Title was appended to the Institutes of Gaius is uncertain; the concluding portion of the Manuscript being lost or illegible.

In order to determine the *place* which should be assigned to *Criminal Law* (or, rather, in order to determine the *arrangement* which should be given to the *whole* AGGREGATE of Law—'Omne CORPUS *Juris*'), it would be necessary to settle the import of an extremely perplexing distinction: namely, the distinction between *Public Law* and *Private* (or Civil) Law.—According to the large and vague meaning which is often attached to it, '*Public Law*' comprises not only the whole of *Criminal Law*, but also much, if not the whole, of the Law which, commonly, is denominated '*Private*.' And if the term be taken in this its loose signification, a distinct and intelligible arrangement of the *Corpus Juris* is simply impossible. According to the strict and determinate meaning which seems to have been annexed to it by some, '*Public Law*' is *included* in the *Law of Persons*: that is to say, it is merely a subordinate member of that great Aggregate or Whole, which, under the absurd name of '*Private Law*,' is frequently *opposed* to it. If '*Public Law*' be taken in this its definite import, there is only a small, though weighty, portion of *Criminal*, that can possibly be referred to it with propriety.—See Table III. *sub fine*.

Summary of TABLES I. AND II.

JUS (law) PUBLICUM :

JUS (law) PERSONARUM :
Regarding the *Status* or *Conditions* of Persons :
that is to say, the *distinctive* Rights and Duties,
Capacities and Incapacities, which are the
basis of the *Division of Persons*, or of the *Dis-*
tribution of Persons into Classes.
[See Table II. note 2 ; note 3, C. b. Table
IV. Sec. 2.]

JUS (law) PRIVATUM :
Comprising—

JUS (law) REERUM :
Regarding Rights, Duties, and Capacities,
generically ; that is to say, apart from the
Rights and Duties, Capacities and Incapa-
cities, by which Classes of Persons are *dis-*
tinguished :

JUS (law) ACTIONUM :
Law of Civil Procedure.

Describing—

The *Subjects* and *Objects* of rights and duties—Res :
[See Table I. note 5. Table II. note 2 : note 3, C. a.]

Rights and *Duties* themselves—Res (INCORPORABLES) ;
The *Events* by which *rights* are given or withdrawn, and
duties imposed or removed ;
Rights and duties being divisible into—

Rights IN REM with their corresponding
OFFICES ;

Rights IN PERSONAM with their correspond-
ing OBLIGATIONS.

[See Table I. note 6. Table II. note 3.]

TABLE II.

The Arrangement which was intended by the Roman Institutional Writers (according to the opinion current amongst Civilians from the latter portion of the 16th to that of the 18th Century). [*§*note 1.]

| JUS (law) PUBLICUM : | | JUS (law) PRIVATUM : Which comprises— | |
|---|--|---|--|
| <p>JUS (law) PERSONARUM : (in the language of the Classical Jurists, 'Jus quod ad PERSONAS pertinet,' sive 'De PERSONIS,' etc.)</p> | <p>JUS (law) RERUM : [<i>§</i>note 2.] (in the language of the Classical Jurists, 'Jus quod ad Res pertinet,' sive 'De REBUS :') Which relates to—</p> | <p>JUS (law) ACTIONUM : (in the language of the Classical Jurists, 'Jus quod ad ACTIONES pertinet,' sive 'De ACTIONIBUS.')</p> | |
| | | | |
| | | | |
| | | | |
| <p>JUS (or <i>jura</i> i.e. rights) IN RE : Otherwise styled</p> | <p>JUS (or <i>jura</i>, i.e. rights) AD REM (i.e. <i>ad rem ACQUIRENDAM</i>) : [<i>§</i>notes 3 and 4.] Otherwise styled</p> | | |
| <p>JUS (or <i>jura</i>) IN REM : Otherwise,</p> | <p>JUS (or <i>jura</i>) IN PERSONAM (i.e. <i>in personam CERTAM</i> sive <i>DETERMINATAM</i>) : [<i>§</i>note 3.] Otherwise,</p> | | |
| <p>JUS REALE (or <i>jura realia</i>) : (in the language of the Classical Jurists, 'DOMINIUM,' <i>sensu latiore</i> :)</p> | <p>JUS PERSONALE (or <i>jura Personalia</i>) : [<i>§</i>notes 3 and 5.] (in the language of the Classical Jurists, 'OBLIGATIO :')</p> | | |
| <p>A class of Rights (their corresponding Duties being implied) which contains the following genera : viz.—</p> | <p>A class of Rights and Obligations which contains the following genera : viz.—</p> | | |
| <p>DOMINIUM : JURA IN RE aliena : (<i>sensu stricto</i>.) velut, <i>Servitius, Jus Pignoris</i>, etc. :</p> | <p>JURIS (sive <i>Rerum UNIVERSITATES</i> : velut, <i>Jus Hereditatis</i> (sive <i>Hereditarium</i>), <i>Dotis, Peculii</i>, etc. :</p> | <p>OBLIGATIONES ex Contractu (or more generally ex <i>Conventionione</i>) [<i>§</i>note 6], et <i>quasi ex Contractu</i>.</p> | <p>OBLIGATIONES ex Delicto : [See Table I. note 7.]</p> |
| <p>JUS POSSESSIONIS : QUASI POSSESSIO.</p> | | | <p>OBLIGATIONES quasi ex Delicto. [See Table I. note 8.]</p> |

For the *§*notes to this Table, see the next page.]

NOTES TO TABLE II.

[**Note 1.**] This arrangement coincides exactly with that which I have given in Table I. But in lieu of the terms which occur in the Institutes of Justinian, in the Excerpts from the Classical Jurists of which his Digests are composed, in the Institutes of Gaius, etc., I have here substituted terms which originated in the Middle Ages, or in times still more recent. For the following, amongst other reasons, these terms demand attention.

TABLE II.
Note 1, 2.

1. Expositors of the Roman Law often introduce them into their writings without sufficient explanation; without *opposing* them to the corresponding expressions which were employed by the authors of the system.

2. Writers upon Universal Jurisprudence, upon the so-called Law of Nations, and even upon Morals generally, have often drawn largely from that justly celebrated system; and, in their express or tacit references to it, have commonly adopted the terms devised by modern Civilians, or by Commentators of the Middle Ages.

3. These terms have been imported into the technical language of the systems which are mainly derived from the Roman: *e.g.* the French Law, the Prussian Law, the Common or General Law of Germany.

4. *Some* of these terms are better constructed than the corresponding expressions of the Ancients; and are, indeed, the *only* ones, authorised by general use, which denote the intended meaning without the most perplexing ambiguity.

Trace the Arrangement, which is given in the Table above, through the following places of Heineccius, the most celebrated teacher of the Roman Law in the eighteenth century:—‘*Elementa Juris Civilis secundum Ordinem Institutionum*’; together with his admirable, though less known ‘*Recitationes in Elementa*, etc.’—Lib. i. tit. 1. §§ 30, 31.—tit. 2. § 74—ii. tit. 1. § 310 in princip. §§ 331 to 334. § 335 in princip.—tit. 3. § 392.—tit. 10. § 484.—iii. tit. 14. §§ 767, 768, 771, 772, 774, 778.—tit. 28.—iv. tit. 1.—tit. 5.—tit. 6.—tit. 18. And see the corresponding places of his ‘*Antiquitates*,’ in which the Arrangement of the Institutes is also observed.

[**Note 2.**] ‘*Jus RERUM:*’ *i.e.* Law regarding Rights and Obligations *in general*, together with the *Things* which are their

TABLE II.
Note 2, 3, A.

subjects or objects. It stands opposed, on the one side, to *Jus ACTIONUM* : *i.e.* Law not regarding *substantive* rights and obligations, but the *means* by which they are enforced when a resort to the tribunals is necessary. (See Tables V. VI. note 2.) It stands opposed, on the other side, to *Jus PERSONARUM* : *i.e.* Law regarding the *distinctive* rights and obligations, which arise from (or, rather compose) the various *conditions* of persons. (See below, note 3, C. b. : And see Table IV. sec. 2.)

It was probably styled *Jus RERUM*, or *Jus quod ad RES pertinet*, for one of the following reasons :—

1. Inasmuch as the term *RES* included rights and obligations, the *general* law or doctrine of *rights* and *obligations* might be styled *Jus RERUM*, without a solecism. (See Table I. note 5.)

2. The description of the *RES*, which are *subjects* of rights and obligations, is placed, in the Institutes, at the *beginning* of the *Jus RERUM* : and hence, a name, strictly belonging to a *section* was naturally extended to the *whole department* of which that particular section was the prominent and most obvious feature. So the *third* department embraces the law of *Procedure* ; but as *Actions* (strictly so called) occupy the foremost place, the *whole* is denoted by the partial and inadequate name of *Jus ACTIONUM*.

The arrangement of the Roman Lawyers is liable to objection in the detail, but is manifestly just in the main ; though certain modern writers have involved it in thick obscurity, by grossly misconceiving the purpose, and grievously distorting the expressions.

[Note 3.] (A.) '*Jus in Re—Jus in REM—Jus REALE—DOMINIUM sensu latiore* :'

These expressions are synonymous. Taken in the largest signification of which they are susceptible, they denote a class of rights which may be defined thus :—Rights of persons *against* ALL other persons, or, at least, against other persons *generally* : —' *Facultas homini competens sine respectu ad CERTAM personam.*' Or these rights may be defined as follows :—Such rights of persons as answer to *obligations* incumbent upon ALL other persons, or, at least, upon other persons *generally*.

'*Jus AD Rem—Jus in PERSONAM—Jus PERSONALE—OBLIGATIO* :'

Taken in the largest signification of which they are suscept-

ible, these synonymous expressions denote a class of rights to which the ensuing definitions will apply:—Rights of persons *against* DETERMINATE persons:—Rights answering to obligations incumbent upon *determinate* persons:—‘*Facultas homini competens in CERTAM personam.*’

TABLE II.
Note 3, A.,
B. a.

Rights of the first class, and rights of the second class, are, therefore, distinguishable by this:—The *obligations* correlating with these, are limited to *determinate* persons: the *duties* (or obligations) correlating with those, attach *universally* or *generally*.

But though this is the essence of the distinction, they are further distinguishable thus. The duties or obligations which answer to rights of the first class, are, all of them, *negative*: that is to say, obligations to *forbear* or *abstain*. Of those obligations which answer to rights of the second class, some are negative, but some (and most) are *positive*: that is to say, obligations to *do* or *perform*.

(B.) The full exposition of this all-pervading distinction, is necessarily reserved for the Course of Lectures to which these Tables are intended to serve as helps. But, perhaps, the following examples will give the clue to its import.

(a.) *Ownership* or *Property* (equivalent to *Dominion*, taken in its limited senses), is a term of such complex and various meaning, that it were hardly possible to force a just explanation of it into the narrow compass of a note. But in order to illustrate the distinction here in question, *Ownership* may be described, accurately enough, thus:—The Right to *use* or *deal with* some given subject, in a *manner*, or to an *extent*, which, though it is not unlimited, is *indefinite*. In which description is necessarily implied, that the Law will protect or relieve the owner against every disturbance of his right on the part of any other person. To change the expression, *all* other persons are bound to *forbear* from acts inconsistent with the scope of his right. But, here, the obligations *which correlate with that very right*, terminate. Every *positive* obligation which may *regard* or *concern* that right, is nevertheless foreign or extraneous to it, and flows from some incident *specially* binding the party upon whom the obligation falls: for instance, from a contract into which he enters with the owner of the subject, or a delict which he commits against his right of ownership. In other words, every such *positive*

TABLE II.
Note 3, B.
a., B. b.

obligation is confined to a *determinate* person, and is, therefore, an *obligation* (in the sense of the Roman Lawyers). And even an obligation which is *negative* and *regards* the right of ownership, will not *correspond to that very right*, in case the *vinculum* be *special*; that is to say, not attaching indefinitely upon *all* mankind, but binding some *certain* person or some *certain* persons, and arising from some incident which particularly regards the obliged.

It follows that Ownership or Property is *Jus in Rem*. For ownership is a right of a person, *over or to* a person or thing, *against ALL other persons*:—a right implying and exclusively resting upon *obligations* which are at once *universal* and *negative*.

In case the *subject of Jus in Rem* happen to be a *person*, the position of the party entitled wears a double aspect. He has rights (*in rem*) *over or to* the subject, as against other persons generally. He has also rights (*in personam*) *against the subject*, or lies under *obligations* (in the narrower meaning of the term) *towards* the subject.

See below, in the present note, C. b.

(b.) *Servitus* (for which the English 'easement' is hardly an adequate expression) is a right to use or enjoy, in a *given or definite* manner, a subject *owned* by another. Take, for instance, a Right of Way over another's land.

The *term* is often extended to certain rights, which, properly, are rights of *ownership* limited in point of duration: *e.g. Usus-fructus, Usus, Habitatio*. It has also been applied to a right (*Superficies*), which, justly considered, is a *species of Condominium*: *i.e.* a right of *ownership* over some given subject, but limited by a right, similar and *simultaneous*, which resides in another person. But as *servitudes* are frequently distinguished, and by the Roman Lawyers themselves, from the rights which I have just mentioned, I think that authority as well as the reason of the thing, justifies the description above.

Now according to that description, the capital difference between Ownership and *Servitus* lies in this: that the right of *dealing with* the subject, which resides in the owner or proprietor, is larger, and indeed, indefinite; whilst that which resides in the party entitled to the servitude, is narrower and determinate. In respect of the grand distinction which here is directly in question, Ownership and *Servitus* are equivalent. *Servitus*, like Ownership, is *Jus in Rem*. For it avails against *all* mankind, including the *owner* of the subject. Or (changing the expression)

it supposes an *obligation* on *all* (the owner again included) to *forbear* from every act which would prevent or hinder the enjoyment. But this is the only obligation which *corresponds* to the *Jus SERVITUTIS*: every *special* obligation which happens to *regard* it, being nevertheless foreign or extraneous to it. Suppose, for example, that the servitude is *constituted* (or granted) by the owner or proprietor of the subject: and suppose that the owner or proprietor also *contracts* with the grantee, *not* to molest him in the exercise of the right. Now, here, the grantor of the servitude lies under *two* obligations: one of them arising from the grant, and answering to the right which it creates; the other derived from the contract by which he is *specially* bound, and answering to the right (*in personam*) which the contract vests in the grantee. In case he molest the grantee in the exercise of the servitude, the act is single, but the injury is double. He violates an *Officium* (or duty) which he shares with the rest of mankind, and he also breaks an *Obligation* which arises from his peculiar position.

TABLE II.
Note 3. B.
b., B. c.

(c.) Having given an example or two of Rights *in rem*, I will now produce examples of Rights *in personam*.

Rights begotten by *Contracts* (or, ascending to a larger expression, by *Pacts* or *Conventions*), belong, all of them, to this last-mentioned class: although there are certain cases (incapable of explanation here), in which the right of ownership, and others of the same kind, are said (by a solecism) to arise from *contracts*, or are even talked of (with conspicuous and flagrant absurdity) as if they arose from *obligations* in the sense of the Roman lawyers.

Rights which, properly speaking, arise from *contracts*, avail against the parties who bind themselves by contract, and also against the parties who are said to *represent* their *persons*: that is to say, who succeed, on certain events, to the *universitas* (or bulk) of their rights, and, therefore, to their *faculties* (or means) of fulfilling or liquidating their obligations. But as against persons who neither oblige themselves by contract, nor succeed *per universitatem* to the means of performing obligations, rights which, properly speaking, arise from *Contracts*, are nothing. Suppose, for example, that *you* contract with *me* to deliver me some movable (a slave, a horse, a garment, or what not); but, instead of delivering it to *me*, in pursuance of the contract, that you sell and deliver it to *another*. Now, here, the rights which I acquire by virtue of the Contract or Agreement are the follow-

TABLE II.
Note 3, B.,
c., B. d.

ing. I have a right to the movable in question, as against you *specially*: *jus AD rem* (ACQUIRENDAM). So long as the ownership and the possession continue to reside in *you*, I can force you to deliver me the thing in specific performance of your agreement, or, at least, to make me satisfaction, in case you detain it. After the delivery to the *buyer*, I can compel you to make me satisfaction for your breach of the contract with *me*. But here my rights end. As against strangers to that contract, I have no right whatever to the movable in question. And, by consequence, I can neither compel the buyer to yield it to *me*, nor force him to make me satisfaction as detaining a thing of *mine*. For '*obligationum substantia non in eo consistit ut aliquod nostrum faciat, sed ut alium nobis obstringat ad dandum aliquid, vel faciendum, vel præstandum.*' (See the admirable Title in the Digests, '*De Obligationibus et Actionibus*,' xlv. 7.) But if you deliver the movable, in pursuance of your agreement with *me*, my position *towards other persons generally* assumes a different aspect. In consequence of the Delivery by *you* and the concurring Apprehension by *me*, the thing becomes *mine*: for the Delivery and Apprehension are a *Modus ACQUISITIONIS*, and not, like the Contract of which they are a consequence, a *Titulus AD ACQUIRENDUM*. I have now *jus in rem*:—a right to the thing delivered, as against *all* mankind: a right answering to obligations *negative* and *universal*. And, by consequence, I can compel the restitution of the subject from *any* who may take and detain it, or can force him to make me satisfaction as for an injury to my right of ownership.—*Ubi rem meam invenio, ibi eam vindico; sive cum ea personâ negotium mihi fuerit, sive non fuerit. Contra, si a bibliopolâ librum emi, isque eum nondum mihi traditum vendiderit iterum Sempronio, ego sane contra Sempronium agere nequeo; quia cum eo nullum mihi unquam intercessit negotium: sed agere debeo adversus bibliopolam a quo emi; quia ago ex contractu, i.e. ex jura AD rem.*'—Heineccii *Recitationes*, lib. ii. tit. I. § 331.

(d.) *Rights of Action*, with all other rights founded upon *injuries*, are also *jura in personam*. For they answer to obligations attaching upon the *determinate* persons, from whom the injuries have proceeded, or from whom they are apprehended.

It is true that difficulties have arisen about the nature of Actions *in rem*; i.e. those Actions (or, rather, those Rights of Action) of which the *ground* is an offence against a right *in rem*, and of which the *intention* (scope, or purpose) is the *restitution*

of the injured party to the exercise of the violated right. But these and other difficulties besetting the Theory of Actions, appear to have sprung from this: that the nature of the right which is affected by the injury, and the nature of the remedy which is the purpose of the action, are frequently blended and compounded by expositors of the Roman Law. Which confusion of ideas absolutely disparate and distinct, seems to have arisen from the abridged shape of the expressions by which rights of action are commonly denoted. By an *ellipsis* commodious and inviting, but leading to confusion and obscurity, a name or phrase applicable to the violated right, is often extended improperly to the remedy. Thus, the phrase '*in rem*' is extended to certain actions, which, though they are necessarily directed against determinate persons, are grounded upon violations of rights availing against all mankind. And, thus, certain actions are styled '*ex contractu*,' although they properly arise from the *non-performance* of contracts, and are only remote and incidental consequences of the contracts themselves.

TABLE II.
Note 3, B.
d., C. a.

To pursue this subject further were inconsistent with my present purpose. But before I dismiss it, I will advert to an important remark made (I think) by Leibnitz—Every right to *restitution* is a right *in personam*. In case the party against whom it avails be unconscious of the right, the right, with the corresponding obligation, is (*quasi*) *ex contractu*. For, since he is perfectly clear of intention and negligence, he is also innocent of wrong. But so soon as he is apprised of the right, either by demand or otherwise, it passes from the department (*quasi*) *ex contractu* to the class of rights and obligations which properly are founded upon *injuries*.

(C.) Hitherto I have tried to illustrate the distinction which is the subject of the present note, by apt *examples*. A brief examination of the *terms* by which it is usually expressed, may cast a stronger light upon the import of that distinction, and upon the importance of seizing its import in a precise and comprehensive manner.

(a.) *Jus in re*—*Jus in rem*—*Jus reale*—*Dominium* (in the large signification), will, none of them, indicate the distinction, considered in its whole extent, without a degree of ambiguity. For though they denote (when taken in the largest meaning of which they are susceptible) every right availing *universally* or *generally*, they are commonly used by the Roman Lawyers, or by succeeding Civilians, for the purpose of signifying rights over

TABLE II.
Note 3, C.
a., C. b.

or to *Things*: that is to say, *Things* in the narrower acceptation: *permanent* objects which are not *persons*: *things* which, on the one hand, are opposed to *persons* themselves; and which, on the other, are distinguished from the *acts of persons*, and from the rest of the *transient* objects denominated *facts* or *events*.

But of *jura quæ valent in alios* GENERATIM—of rights which avail or obtain against other persons *generally*—of rights which answer to obligations *general* and *negative*, some are rights over or to *persons*, and some have *no* subject (person or thing).

The terms now under consideration are, therefore, of *varying* extension. They are *generic* and *specific*. They sometimes denote universally the department of rights in question, but are commonly used in a narrower signification, and restricted to a subordinate class. Consequently, there is no concise expression, authorised by established use, which denotes the whole of these rights adequately and unambiguously.

(b.) Of rights existing over or to *persons*, and availing against other persons generally, take the following examples:—The right of the father to the custody and education of the child—the right of the guardian to the custody and education of the ward—the right of the master to the services of the slave or servant.

Against the child or ward, and against the slave or servant, these rights are rights *in personam*: that is to say, rights answering to *obligations* upon those *determinate* individuals. In case the child or ward desert the father or guardian, or refuse the lessons of the teacher whom the father or guardian has appointed, the father or guardian may compel him to return, and may punish him with due moderation for his laziness or perverseness. If the slave run from his work, the master may force him back, and drive him to his work by chastisement. If the servant abandon his service before its due expiration, the master may sue him for breach of the *contract of hiring*, or for breach of an obligation (*quasi ex contractu*) implied in the *status* of servant.

Considered under another aspect, these rights are of another character, and belong to another class. Considered under that aspect, they avail or obtain against other persons generally, and the obligations (or, rather, the *officia*) to which they correspond, are invariably *negative*. As against other persons generally, they are not so much rights to the *custody and education* of the child, to the *custody and education* of the ward, and to the *services* of the slave or servant, as rights to the *exercise* of such rights *without molestation by strangers*. As against strangers, their substance

TABLE II.
Note 3, C. b.

consists of duties, incumbent upon strangers, to *forbear* or *abstain* from acts inconsistent with their scope or purpose. In case the child (or ward) be detained from the father (or guardian), the latter can *recover* him from the stranger by a proceeding in a Court of Justice, which, let it be named as it may, is substantially an action *in rem*: that is to say, an action grounded on an injury to a right which avails generally, and seeking the *restitution* of the injured party to the exercise of that violated right. In case the child be beaten or otherwise harmed injuriously, the father has an action against the wrongdoer for the wrong to his *interest* in the child. In case the slave be detained from his master's service, the master can recover him *in specie* (or his value in the shape of damages) from the stranger who wrongfully detains him. In case the slave be harmed and rendered unfit for his work, the master is entitled to satisfaction for the injury to his right of ownership. If the servant be seduced from his service, the master can sue the servant for breach of contract; and *also* the instigator of the desertion, for the wrong to his *interest* in the servant. In case the servant be harmed and disabled from rendering his service, the harm is an injury to the master's *interest* in the servant, as well as to the person of the latter.

The correlating conditions or *status* of husband and wife, will also illustrate that capital distinction which it is the purpose of the present note to explain or suggest.

Between themselves, they have mutual rights *in personam*, and are subject to corresponding obligations. Moreover, each has rights to the other availing against the rest of the world, and answering to duties, which, invariably, are negative. Adultery *by* the wife violates a right of the first class, and entitles the husband, against the *wife*, to a divorce *a mensâ et thoro*. Adultery *with* the wife violates a right of the second class, and gives him an action for damages, against the *adulterer*.

A right or interest *to* or *in* a person, and a right or interest *to* or *in* a thing, differ in this: that the *subject* of the former belongs to the class of *persons*, whilst that of the latter is a *thing*, in the narrower acceptation of the term. (See above, in the present note, C. a.) With reference to the capital distinction which is the matter of the present note, these rights are precisely equivalent. Each is a right availing *universally* or *generally*, and implying or *composed of* obligations, incumbent upon the world at large, to *forbear* from such *positive acts* as would defeat or

TABLE II.
Note 3, C. b.

thwart its purpose. The rights (*in personam determinatam*) and the obligations (*stricto sensu*), which invariably concur with the former, are nevertheless distinct from it; just as a like obligation, which may concern or regard the latter, is nevertheless extraneous to it. (See above, in the present note, B. a. b.)

But though these rights are thus equivalent or identical, certain writers have marked and distinguished the former by a peculiar name.

A right or interest to or in a *person*, has been styled, in German, '*dinglich-persönliches Recht*;' '*persönliches Recht auf dingliche Art*;' '*persönliches Recht von dinglicher Beschaffenheit*;' '*Recht auf eine Person als auf eine Sache*;' In modern Latin, '*jus realiter personale*.' Each of which expressions may be rendered into English by this: 'A right or interest to or in a person *as if* that person were a *thing*.'

The author of this innovation upon the established language of the science was *Kant*. See his '*Metaphysische Anfangsgründe der Rechtslehre*;'—'*Metaphysical Principles of the Science of Law*;' A treatise darkened by a philosophy which, I own, is my aversion, but abounding, I must needs admit, with traces of rare sagacity. He has seized a number of notions, complex and difficult in the extreme, with a distinctness and precision which are marvellous, considering the scantiness of his means. For, of positive systems of law he had scarcely the slightest tincture; and the knowledge of the principles of jurisprudence which he borrowed from other writers, was drawn, for the most part, from the muddiest sources: from books about the fustian which is styled the Law of Nature.

But though this novelty comes from an imposing quarter, and has even been adopted by lawyers of consummate acuteness and learning, I venture to pronounce it needless, and pregnant with perplexity and error.

'*In Rem*' (—a phrase purely classical, barbarous and uncouth as it may look) would obviate the fancied necessity for these newfangled expressions, supposing it were used in a manner which analogy justifies or commands. The phrase is nowhere employed by the Roman Lawyers themselves, for the purpose of signifying briefly, and withal adequately and unambiguously, the entire class of rights which avail against the world at large. But if it were applied by *us* to this most important purpose, in a manner *analogous* to the modes in which it was applied by *them*, it would accomplish the purpose perfectly. Thus applied, it would denote the *compass* of

TABLE II.
Note 3, C. b.

a right, and not the *nature* of its *subject*. It would indicate that the right in question availed against other persons *generally*, without denoting *also* that its *subject* was a *thing*. It would apply to rights over persons, as well as to rights over things, without the shadow of a solecism. [See below, in the present note, C. d. 8.] Consequently, the newfangled expression, '*jus realiter personale*,' with others of the like intention, are needless. '*Jus in rem*,' taken in the large signification which analogy justifies, would point with perfect precision at the *generic* property of the right. And in case it were necessary to indicate 'that its *subject* was a *person*,' this, its *specific* property, might be adjoined briefly and easily, by a slight qualification of the term: *E.g.* '*jus in rem* over (or to) a *person*.'

Nor are these ungainly expressions merely needless. Those amongst them which are not some yard in length, and which are properly names rather than definitions or descriptions, are ambiguous as well as needless. According to the intention of their author, and of those who have adopted them, they *should* suggest to the hearer or reader, the *extensive compass* of the rights which they are used to denote. They *ought* to indicate that these rights are *not* of the class which avail against *determinate* persons: that though their subjects are *persons*, they avail against the world at large *as if* they were rights over things. Now, according to established usage the term *personale* (or *persönliches*) intimates the reverse: *jus personale* commonly signifying rights which obtain against persons *certain*. Consequently, the expressions now in question defeat their own end, by suggesting the very notion which it is their purpose to exclude. Nor is this inconvenience obviated by the adverb *realiter* (or *dinglich*), which is adjoined to the term *personale* for the purpose of qualifying its import. To a mind exclusively conversant with the established language, '*jus realiter personale*' (or '*dinglich-persönliches Recht*') would probably suggest a *species* of *jus personale*, though not the entire class. Instead of suggesting, as it should, *jus in rem* over a *person*, it would probably seem to indicate that *sort* of *jus in personam* which is usually denoted by the expression *jus ad rem* (*acquirendam*), and to which that significant expression ought to be confined. In other words, it would probably seem to indicate those rights *in personam*, which imply and consist of obligations '*ad dandum aliquid*:' that is to say, obligations to deliver a *thing* (or to pass a right *in rem*) at the instance and appointment of the obligee. [See above, in the present note, B. c.; and below, note 4.]

TABLE II.
Note 3, C. b.

Before I pass from the subject directly under consideration, I will offer a few remarks which it naturally suggests; and for which the present place is the least inconvenient that I can find, though they are rather digressive from the general subject of the Note.

Rights or Interests over or in PERSONS, with the general and special obligations which those rights or interests imply, fall under the department of Law denominated *Jus Personarum*. They flow from those *Differences of persons* (styled *Conditions* or *Status*), which are the basis of the *Division of persons*, or of the *Distribution of persons into classes*. Or (speaking more accurately) these rights and obligations are *ingredients* or *constituent parts* entering into the composition of those differences.

For the various conditions (or *status*) of various persons, are not the *sources* of differences in their rights, obligations and capacities (—‘*qualitates quarum ratione diverso jure utuntur*’) but are *constituted* or *formed* of those very differences.

A given person bears a given condition (or, changing the expression, belongs to a given class), by virtue of *distinctive* rights, capacities, and duties—by a *want* of certain rights, and of capacities to take those rights—or by *exemptions* from certain obligations. In other words, these rights, capacities, and duties, or these incapacities and exemptions, are considered as forming or composing a single though complex being, and are bound into that complex One by the collective name ‘condition.’

His condition is not the *source* of his distinctive rights and obligations, for these *are* his condition, or, at least, constituent parts of it. Their *source* (—‘*id cujus ratione diverso jure utitur*’) is the fact, event, or incident, which *invests him with the condition*; that is to say, gives him the rights and capacities, and subjects him to the duties and incapacities, of which the condition is composed, or for which that word is a name. For example, the barrister or the attorney is distinguished from other men, by peculiar obligations which are imposed upon him, and by peculiar rights which he enjoys. These peculiar obligations, with these peculiar rights, *compose* or *are* the Condition of Barrister or Attorney. The *source* or *cause* of his *condition*, or of his *distinctive* obligations and rights, is his Call to the Bar, or his Admission as an Attorney.

The notion of *status* or *condition* (as understood by the Roman Lawyers), has been covered with thick darkness by the vague talk of their successors, and is not entirely free from difficulty and doubt. But I think that the plain account of

it, which I have given above, will be found to tally with the truth, or to approach it pretty closely, by those who will take the trouble (trouble too seldom taken) of seeking, inspecting, and collating the original and proper authorities.

See and compare the following places:—*Gaii Comm* i. §§ 8, 9, 13, 67, 80, 81, 128, 159, 162.—*Inst.* i. 3, § 4.—i. 5, § 3.—i. 16, § 4.—i. 22, § 4.—ii. 11, § 5.—ii. 17, §§ 1, 4, 6.—*Dig.* i. 5 (*De statu hominum*), l. 5, pr. *ll.* 9, 21, 26, *sub fine*.—i. 9. (*De Senatoribus*), l. 10.—iv. 5 (*De capite minutis*), l. 3, § 1, l. 11.

To fix the notion of STATUS with perfect exactness, seems to be impossible. For there are certain sets or series of rights and obligations, which would probably be considered by one man as forming or composing *Status*, though another would rather refer them to the *Jus Rerum*: i.e. the Law (or Doctrine) of Rights and Obligations *in general*, or of Rights and Obligations *abstracted or apart from conditions*. [See above, note 2: and also Table IV. Sec. 2.]

The matter is full of embarrassment, and I presume to touch it with no small hesitation. But still I will venture to *suggest*, that the following properties or marks are, perhaps, the *test* of a Condition: that is, may serve to distinguish Conditions properly so called, from Rights, Obligations, and Capacities to which the name is inapplicable.

1. The duties or obligations, which are constituent parts of conditions, or which correspond to rights entering into the composition of conditions, are general or indeterminate: that is to say, obligations to acts or forbearances indefinite in respect of *number*.

For example, If you hire another *as your servant*, two *conditions* (those of master and servant), are created by the contract. For each incurs obligations and each requires rights, of which the objects are not determined *individually*, although their *kinds* may be fixed. *You* are obliged to feed him, etc., so long as the contract shall continue; and *he* is obliged to render a series of services, which are equally indefinite as to number.

But if you hire another *to do some single service* (as to go on a given errand), the *conditions* of master and servant are not created by the contract: nor, even in popular and vague language, would he be called your servant, or you his master. And a like remark will apply to every legal relation, which consists of a right, or an obligation, to a *determinate* act or forbearance. No one ascribes a *status* to Buyer or Seller, etc.

TABLE II.
Note 3, C. b.

The duties or obligations, which are constituent parts of conditions, or which correspond to rights entering into the composition of conditions, are also indeterminate in this: that the acts or forbearances which are their objects, are indefinite with respect to *kind*.

If you hire another *as your servant*, the *kinds* of services which he undertakes to render, are just as undetermined as the *single* or *individual* services to which the contract binds him. Consequently, you are master, and he is servant; or you and he are severally clothed with the *conditions* which are denoted by those names.

But if you engaged another to render services *of a class* (as to supply your family with bread, to shoe your horses, or the like), you and he would hardly be clothed with *conditions* by virtue of that contract. And the same remark will apply to the relation of Landlord and Tenant, of Principal and Factor, of Grantor and Grantee of an Annuity, etc. For in all these cases, the services to be rendered by the parties, are fixed or circumscribed as to kind, although the acts or forbearances to which they are bound are not determined as to number.

In short, Rights, Duties, Capacities, or Incapacities, can hardly be said to constitute a *Status* or Condition, unless they impart to the person a conspicuous character: unless they run through his position in a continued vein or stratum: unless they tinge the whole of his legal being with a distinctive and obvious colour.—All which talk is certainly a tissue of metaphors, and therefore little better than sheer trumpery. But such are the difficulties sticking to the matter in question, that I am tempted at every instant to flee from the toilsome analysis, and take to the ready refuge of ignorant or perplexed interpreters.

For instance: Whether the circumstances which I have mentioned as the *second* mark of a condition, be indeed such a mark, seems to admit of doubt.

There certainly are many *Status* in which it occurs, and of which it is a prominent and striking feature: *e.g.* those of Husband and Wife, Parent and Child, Guardian and Ward, Master and Slave, Alien, Insolvent, Magistrate, etc. In all which cases, the distinctive duties of the parties, or the duties which correspond to their distinctive rights, oblige to acts and forbearances indefinite in respect of kind. Instead of being confined or circumscribed by a well-determined description, these acts and forbearances run indistinctly through numerous and disparate classes.

But I think I might talk, without impropriety, of the *Condition* of an *Agricultural* Servant: And yet the rights and duties of the master and servant are, here, of a definite character.

The Right, Interest, or Estate, which a man may have in a *Dignity*, presents a similar difficulty. The scope or purpose of the right is to bear a Title of Honour; and to get therewith the admiration or deference which that distinctive and honorary mark may extract from the rest of the world. Consequently, the duties which correspond to the right, are simply and exactly circumscribed. They are merely obligations, incumbent upon other persons generally, to abstain from all such acts as might cast a slur upon the right: *E.g.* disputing the title of the party to wear the honorary badge; or treating the badge itself irreverently, to the possible damage of the worth which it derives from current opinion.

But yet I imagine, that a person invested with a Dignity, is also invested, by virtue of the Dignity, with a *Status* or Condition: and that in an Arrangement of Law founded upon just principles, this his distinctive right, together with the corresponding duties, would be detached from General Law (or *Jus Rerum*), and inserted in Special Law (or *Jus Personarum*). [See above, note 2, and also Table IV. Sec. 2.]

It is scarcely necessary to remark, that I have here been speaking of a Dignity considered simply or by himself. The *status* or conditions constituted by rights of the sort, are absolutely distinct from the political or public *status*, which not unfrequently concur with them in the same individuals. The political powers of an English Peer, might be precisely what they are, although he were not distinguished by a single honorary title. And a right to a Dignity (as to that of Baronet, for instance), is frequently unconnected with a political or public character.

3. Certain Conditions are purely or mostly *onerous*.—Such is the Condition of the Slave: to whom the Law refuses rights, or deals them with a niggard hand. According to the Roman Law (down to the age of the Antonines), the slave had ‘*nullum caput* ;’ was ‘*res* :’ that is to say, he was the *subject* of rights residing in his master; lay under *obligations* towards his master and others; but enjoyed not a particle of right against a single creature. As the subject of another’s rights, he was susceptible of *damage*; but he was not susceptible of *injury*.—According to the same system (in its earlier and ruder state), the Son *in potestate*, and the Wife *in manu*, were also ‘*res*,’ in respect of the Father

TABLE II.
Note 3, C. b.

and Husband ; although they had '*caput*,' or were invested with rights, in respect of third persons.

Now to talk of a *right* or *interest* in a purely *onerous* condition, were to talk absurdly. But so far as a condition is lucrative, or consists of rights and advantages, we may imagine an interest in the condition, *considered as a complex whole* : considered as '*juris universitas* : ' considered without reference to the single and separate rights, which are component or constituent parts of it. And this, I incline to think, is a mark of every *status* not purely *onerous* : although there are certain aggregates, or *universities* of rights, to which the name of *status* is inapplicable. In other words, though every *juris universitas* is not a *condition*, every *condition*, so far as it consists of rights, is *juris universitas*.

Accordingly, the party has a right in his *condition*, analogous to *ownership* in a single or individual *thing* : *jus in rem* : a right or interest, which avails against the world at large (although the several rights, which are ingredients in his condition, be rights *in personam* merely).

Consequently, wrongs against this right are analogous to wrongs against ownership : And, according to the practice of the Roman Law, wrongs of both classes are redressed by analogous remedies.

Where the individual thing is unlawfully detained from the owner, he *vindicates* or recovers the thing by an action *in rem*. Where the right in the condition is wrongfully disputed, the party asserts his rights by a peculiar and appropriate action, '*quæ in rem esse videtur*.'

According to the practice of the English Law, controversies touching conditions, and other *juris universitates*, are commonly decided or tried in an indirect or incidental manner. Some *particular* right, parcel of the complex whole, is the immediate object of the proceeding ; and the more comprehensive question is handled in the course of this proceeding, obliquely, or by way of episode. For example, The interest of the Assignees in the Estate and Effects of the Bankrupt (or, changing the expression, in the aggregate or *university* of his rights), is frequently impugned and asserted in an action of *assumpsit* or *trover*. And, thus, a question of legitimacy (precisely a question *de statu*), is not uncommonly agitated in an action of *ejectment* or *trespass*.

For these reasons, *juris universitates*, or rights in aggregates of rights, stand out sharply in the Roman law, and are marked with comparative indistinctness in the English. But rights of the sort are not the less known to the latter. They are, in truth,

essential or necessary parts in every possible system of rights and obligations. And, if I were not limited with respect to space and time, I could mention certain proceedings, before certain of the English Courts, wherein rights of the sort are brought directly in question : wherein the complex whole, abstracted from its component parts, is the immediate object of the controversy.

The wrongs, against rights in conditions, to which I have just adverted, are analogous to dispossession or detention, in the case of dominion or ownership. But a right in a condition, like ownership in an individual thing, is also obnoxious to offences which differ from dispossession : by which the enjoyment of the right is not usurped ; by which the title of the party is not impugned ; but by which the right is nevertheless annihilated, or its value diminished or endangered. *E.g.* To wound or beat the Child, is an offence against the *Condition* of the Father. For the mass of the rights and advantages which accrue to the father from his fatherhood, is thereby put in jeopardy, or positively lessened in worth.—To slay the Husband and Father, is not only a crime punishable on the part of the community, but is also a civil injury to the *Conditions* of the Wife and Child. For the sum of the rights and advantages arising from their relation to the deceased, is annihilated or diminished by the act. According to the notions and the practice which have obtained in modern times, the civil injury merges in the crime. But still it is easy to imagine, that the Law might impose upon the criminal a twofold obligation : an obligation to suffer punishment, on the part of the community at large ; and a further obligation to satisfy the parties, whose *interest* in the deceased he has destroyed. Before the abolition of Appeals, this was nearly the case in the Law of England. The murderer was obnoxious to punishment, properly so called ; and, in case that punishment were not inflicted, the wife and the heir of the slain were entitled to vindictive satisfaction, which they exacted or remitted at their pleasure.—If I slander your servant, and you turn him off in consequence, I wrong your servant in his *condition*. I debar him from that aggregate of contingent advantages, which his stay in your service might have given him.—To slander the skill of a surgeon, or to question without cause the solvency of a trader, are wrongs of the same sort. They are not violations of rights to individual subjects or objects, but are offences against *conditions*. They tend to abridge the sum of those future and indeterminate advantages, which the surgeon may derive from his calling, or the trader from his trade.

TABLE II.
Note 3, C. b.

In short, of the several properties or marks which may be found in every *status*, the following would seem to be one:— Every *status*, so far as it consists of rights, is ‘*juris universitas*.’ Therefore, as an aggregate of rights, and abstracted from its component parts, it is the subject of a right *in rem* which is analogous to the right of ownership. Therefore, each of these rights is obnoxious to wrongs, which are also analogous. Therefore, whatever may be the practice of this or that system, offences against ownership, and offences against rights in conditions, admit of analogous remedies.

In conditions which are purely onerous, or consist of obligations only, this mark is not to be found. But conditions of that sort commonly correlate with others in which the mark occurs. The condition of slave, for instance, is implied in the condition of master: and when I consider the latter, I necessarily consider the former. Consequently, if the mark in question belongs to lucrative conditions, it is also indirectly, a mark of onerous conditions.

4. Single persons, or persons determined singly, may be marked or distinguished by peculiar rights and capacities, or peculiar duties and incapacities. For example, The Legislature may grant to an individual, or to a corporate body, the monopoly of some commodity: laying on that individual, or on that artificial person, peculiar obligations with respect to the manufacture or import.

By the Roman Lawyers, and by modern expositors of the system, rights and obligations of the sort are often denominated *singular*: oftener, and less and ambiguously, *privilegia*.

Now certain of these *privilegia* have many of the marks of conditions, but yet are distinguished from conditions. They are not styled conditions, nor are they inserted in ‘The Law of Persons:’ the department of the *Corpus Juris* which is occupied with the description of conditions; and which would be named more appositely, if it were called ‘The Law of *Status*.’

Nor is this exclusion capricious. All privileges are peculiar or distinctive; and some of them have other marks, which are also found in conditions. But though conditions are peculiar, still they are common or general, as contra-distinguished from *singular*: Privileges are peculiar and *singular*. Conditions distinguish persons, considered as members of Classes: Privileges distinguish persons considered singly or individually. The distinctive rights and duties of Fathers, Wives, and Infants, constitute conditions: Distinctive rights or duties limited to

Sempronius or Styles, are not a condition. At least, they are not a condition fit for the Law of Persons.

TABLE II.
Note 3, C. b.

For the Law of Persons or *Status* (and the *Corpus Juris* in general), ought to be occupied with matters of wide and lasting concern. It should no more stoop to the description of these singularities or anomalies, than the Law or Doctrine of Contracts should attempt to anticipate the peculiarities which distinguish contracts individually.

Privileges are matter for a peculiar department belonging to *Jus Rerum*. For, in this peculiar department, they should not be described singly, but considered generally. It should merely determine the principles which regulate privileges as a *class*.

In truth, the Statutes, or Customs, which create or establish privileges, can hardly be ranked with Laws. They are mere anomalies: exorbitant or irregular commands proceeding from the Legislature; or, what in effect is exactly the same thing, eccentric customs tacitly sanctioned by the Legislature. They are not so much analogous to *laws* or *rules of law*, as to *titles*, or *investitive events*. And, accordingly, most of them must be proved by the parties who are interested in sustaining them, before the Courts of Justice can know or notice their existence.

Consequently, *one* mark of Conditions is this: A Condition or *Status* is common to persons of a *class*, and is not restricted to persons *singly* or *individually* determined.

But this, like most propositions, must be qualified. There are certain powers or rights and also certain duties, which are properly ranked with conditions and inserted in the Law of Persons, although they are limited to single men or to single bodies of men. The principle which suggests the exclusion of *singular* rights and obligations, points at the propriety of admitting them in these excepted cases. For the powers and duties in question are of wide and lasting concern: And if they were not inserted in the *Corpus Juris*, this would be little better than a fragment and a riddle. Such are the powers of the Sovereign, where the Sovereign is One. And such are the rights and duties of certain magistrates or companies, who though they are *single* persons, natural or artificial, are clothed with functions which deeply concern the general, and run in a continued vein through the mass or aggregate of the law.

5. It appears from the last section, that a Condition or *Status* is *common* to persons of a *class*. To which I will add (superfluous as the addition may seem), that no Condition or *Status* extends to persons indiscriminately. The rights or duties

TABLE II.
Note 3, C. b.

which *constitute* a Condition, reside exclusively in persons of a given description ; though many of the duties or rights to which they *correspond*, may reside in persons generally, or even in all persons.

This is a truism. But, like all other truisms, it is prone to slip from the memory. If the excellent Sir Matthew Hale had looked to it steadily, and had stayed to ask the meaning of '*Jus Personarum*,' it is certain that he would not have fallen into an extremely gross error which deforms his Analysis of the Law. (See *post*, in Tables VII. and VIII., the Arrangement proposed by Hale, and adopted by Blackstone.) Under the title 'The Rights of Persons' (meaning 'The Law of Persons'), they have placed the right to liberty; the right to bodily security: the right to reputation; with the rest of certain rights which they are pleased to style *absolute*: Rights which, nevertheless, belong pre-eminently and conspicuously to 'The Law of Things:' which of all imaginable rights are precisely the most general: which, in every region on earth, reside in *every* person to whom the Sovereign or State extends a particle of protection. Such, at least, is the case with the right to bodily security, and also with the right to liberty: *i.e.* the right of exercising, without molestation from others, that liberty of doing or forbearing which is conceded by the Law. And such is the case, nearly, with all the rest of the rights, which, under the name of *absolute*, they have foisted into the Law of Persons. All of them are rights residing in all persons, or, at least, in persons generally.

To speak plain English, they either forgot to ask, or they considered slightly and superficially, the following obvious questions:—What is a *Status* or Condition? What are the fit contents of that department of the Law which is styled by the Roman Lawyers, or, rather, by their followers, *Jus Personarum*?

The terms which Hale employs, and which Blackstone copies, shew, without more, that such was the fact. How does the title 'Rights of Persons' apply to the department in question more than to another? The Rights and Obligations of Persons are the subjects of all Law; and all the various departments into which it is divided, equally concern such rights. What would be thought of a treatise on the various races of mankind which should *distinguish* White Men or Black Men by the simple appellative 'Men'?

Nor can we impute this absurdity to the Roman Lawyers, and suppose that Hale and Blackstone were blinded by their example. For they nowhere style this department 'The *Rights*

of Persons.' In two or three passages which lie at the threshold of their Institutes, and in which a stranger to their *system* naturally sticks and is ensnared, they do, indeed, call it 'The Law of Persons,' or 'The Law which concerns Persons.' And here, I admit, they have fallen into nonsense which is scarcely less gross than the other. But their *usual* names for the department are these: '*Divisio Personarum*'—'*De Conditione Hominum*'—'*De Statu Hominum*'—'*De Personarum Statu*.' Names not inapposite, and intimating clearly enough the general scope of their Arrangement.

TABLE II.
Note 3, C. b.

Nor is the opposite department styled by the Roman Lawyers 'The Rights of Things:' a title which, taken literally, ascribes rights to *rights*, and to *things*, *acts*, and *forbearances*, as subjects and objects of rights. Their name was not absurd, although it was wretchedly obscure. It was obscure in consequence of its ambiguity, and in consequence of its elliptical shape. For as '*res*,' in one of its senses, signifies *things*, '*Jus Rerum*' (or '*Jus quod ad Res pertinet*') will hardly suggest to a novice surely and readily, the meaning which was really intended: namely, The Law of *Rights* and *Obligations* (abstracted from Conditions.) And though the term '*res*' signifies rights and obligations, still the elliptical expression '*Jus Rerum*' drops the *characteristic* of the department in question: namely, that it relates to Rights and Obligations *abstracted from Conditions*, and is thereby distinguished from '*Jus Personarum*,' or the department which treats of Conditions.

Before I conclude this digression, which has run to unconscionable length, I will yet venture a remark.—The contents of the great departments '*jus personarum et rerum*,' are perfectly distinct in general, but cross or blend occasionally. The line of demarcation by which the departments are severed has never been observed, nor should it be observed, with inflexible rigour. The principles or grounds of Method are subordinate to the ends of Method.

I have stated, a little above, that certain rights and obligations, which, strictly, are not conditions, should yet be ranked with conditions, and placed in the Law of Persons. I may now add, that certain rights and obligations which, properly, constitute conditions, are placed with propriety in the Law of Things.

This is remarkably the case with the rights and obligations of those who are styled the *general* representatives of testators or intestates, or are said to represent their *persons*: that is to

TABLE II.
Note 3, C. b.

say, who succeed *per universitatem* to their rights and duties, or, at least, to their rights or duties of a given description or class. Such is the *heir*, whether *testamentary* or *legitimate*, of the Roman Law. Such are the *executor* or *administrator* and the *next of kin*, in the Law of England. And such (I may add) is the English *heir*, with the general or particular *devisee*. As opposed to the executor, etc., the heir or devisee has been esteemed a *singular* successor. But it were perfectly easy to demonstrate that he is 'successor *universalis*,' or a *general* representative of the deceased. For he succeeds universally or generally to rights and duties of a class, or, at least, to *duties* of a class.

Now I think you would hunt in vain for a single property or mark, whereby the rights and duties of such universal successors can be distinguished from the purest of the *Conditions* which are placed in the Law of Persons. And, accordingly, Sir Matthew Hale, in his Analysis of the Law, has posted in that department the *relation* of Ancestor and Heir: *i.e.* the *status* or *condition* of the latter.

And yet these rights and duties have never been styled conditions, and are placed by general consent in the Law of Things. The reason of which seeming anomaly I take to be this.

By dividing the aggregate of the law into '*jus personarum et rerum*,' two important ends are or may be attained: brevity and distinctness. Rights and duties *in general* (—all that can be said about them *apart from conditions*), are severed or abstracted from the *distinctive* rights and duties of which conditions are composed. Hence rights and duties *in general* are described once for all. And, hence, the march of these general descriptions is comparatively clear and easy: being freed from the numerous restrictions, extensions, and explanations with which we must take these descriptions, when we look at the matter of conditions. (See Table IV. Sec. 2.)

But in case the rights and duties of these general representatives or successors were ranked with *status* or conditions, the two important ends, which are attained by the division, would be thwarted rather than advanced. For the special matter in question is inseparably connected and interlaced with the general scheme or system of rights and obligations. In order to the explanation of the last, the former must be expounded with it. Consequently, an attempt to treat the former apart from the other, would lead to repetition and obscurity. Such is the intrinsic connection subsisting between the two, that they *must* be considered jointly in spite of the attempt to sever them. And

the title assigned to the former in the Law of Persons, were, therefore, a mere excrescence without an intelligible purpose.

TABLE II.
Note 3, C.
b., C. c.

The questions which I have laboured to elucidate in this long and wearisome digression, are probably the most difficult which the science of jurisprudence presents. Beyond a doubt they rank with the most important. For every attempt to digest the aggregate of the law, or to compose a treatise or commentary embracing the same subject, ought to be preceded by a perspicuous notion of the leading distinctions and divisions. On the degree of precision and justness with which these are conceived and predetermined the merit and success of the attempt will mainly depend. Errors or defects in the details are readily extirped or supplied. Errors in the general design infect the entire system, and are absolutely incurable.

But of all distinctions and divisions, the most comprehensive are these:—The distinction between *Conditions*, and the Rights, Obligations, and Capacities which are *not* Conditions;—The division of Law into *general* and *special*, or Law of Things and Law of Persons.

To fix that distinction firmly, and to draw an intelligible line between those two departments, were to cleanse the science from much of the confusion and jargon by which it is obscured and disgraced. And if the few desultory remarks which I have ventured to throw out, should turn the attention of the reflecting to these weighty and perplexing problems, I shall feel myself more than repaid for the labour which they have cost me, crude and defective as they are.

(c.) It is said in a preceding section (C. a.), ‘that of rights which avail or obtain against other persons *generally*, some are rights over or to *persons*, and some have *no* subject (person or thing).’ Examples of the former have been given in the last section (C. b.). I will now produce, as briefly as I can, a few instances of the latter.

1. The right to *reputation*.—The scope or end of this right, is the esteem or goodwill of the *public*; of that indeterminate number of indeterminate persons, by whom the person in question may happen to be known. And here, it is manifest, there is not the shadow of a subject, *over* which the right can be exercised, or *in* which it can be said to inhere or exist. It is merely a right to that mass of contingent enjoyments, which the person may chance to derive from general approbation and

TABLE II.
Note 3, C. c.

sympathy. And yet this is a right which avails against the world at large: every false imputation thrown upon the person in question being a delict or injury affecting or committed against it.

2. A *monopoly*: or the right of vending exclusively commodities of a given class.—This is a right which illustrates in a striking manner the nature of *jus in rem*. Here, the generic character of the right stands alone. There is not a single circumstance to draw the attention from it. There is no determinate subject (person or thing), *over* which the right is exercised, or *in* which it can be said to exist. Nor is it a right to *sell* commodities of the class. For that is a right which the party would enjoy without the monopoly. The right consists in the duty, which is imposed upon other persons generally, to forbear from all such acts as would defeat or thwart its purpose: namely, from selling commodities of the class.

3. Certain of those rights which are styled in the English Law *franchises*: as, for instance, right of exercising jurisdiction in a given territory, or a right of levying a toll at a bridge or ferry.—In each of these cases the law empowers the party to do certain acts, and lays a negative obligation upon other persons generally to forbear from disturbing the exercise. But the acts are not exercised over a determinate subject. And this peculiarity distinguishes the interest of the party from an interest in a person or thing; as, for instance, property in a slave—the interest of the father or guardian in the child or ward—ownership or *servitus* in or over a field.

It is scarcely necessary to add, that the rights *in personam*, which concur with the rights in question, are perfectly distinct from the latter. Those who reside within my territory are bound to bring their complaints into my court. Those who traverse my bridge or ferry are bound to pay me a toll. But these are *positive* obligations, *specialty* attaching upon persons who stand in peculiar positions. They are broadly distinguished from the general or negative duties, of which my right, considered as *jus in rem*, is constituted or composed: *e.g.* *not* to usurp jurisdiction within the limits of the territory, or *not* to molest passengers crossing the bridge or ferry.

4. Rights or interests in certain *conditions*, considered as *juris universitates*. (See above, C. b.)

In many cases, the right of interest in the *condition* concurs with a right or interest over or in a *person*. For example, the father or husband has an interest in the child or wife; the child

TABLE II.
Note 3, C.
c., C. d.

or wife, in the father or husband; the master, in the slave or servant. But, in other cases, there is no determinate subject (person or thing) to which the right in the condition can be said to relate. Such are rights in the conditions which are constituted by callings or professions. (See above, C. b.)

(d.) One of the great *desiderata* in the language of jurisprudence is this: A pair of opposed expressions denoting briefly and unambiguously the two classes of rights which are the subject of the present note: namely, Rights availing against persons *generally* or *universally*, and Rights availing against persons *certain* or *determinate*.

The opposed or contrasted expressions commonly employed for the purpose, are the following: 'jus in re' and 'jus ad rem'; 'jus in rem' and 'jus in personam'; 'jus reale' and 'jus personale'; 'dominium' (sensu latiore) and 'obligatio.' But these are liable to the general objection which I have explained in the preceding remarks. (See C. a. b. c.) *Jus in re*, *jus in rem*, *jus reale* and *dominium*, will none of them denote, without a degree of ambiguity, the entire class of rights which avail against the world at large. Although they are often employed in that extensive signification, they commonly signify *such* of those rights as are rights to determinate *things*.

Besides this general objection, each of these pairs of terms is liable to special objections, which now I will briefly indicate. In the course of this review, certain terms, synonymous with the terms in question, will be noticed with the same brevity. At the close, I will shortly state my reasons for giving a decided preference to *jus in rem* et *jus in personam*.'

1. 'Jus in re' and 'Jus ad rem.'—*Jus ad rem* signifies *any* right which avails against a person *certain*. Still it is often restricted to a *species* of such rights: to those which correlate with obligations 'ad *dandum* aliquid.' (See above, B. c.: C. b.: And see below, note 4.) It is, therefore, ambiguous.

2. 'Jus reale' and 'Jus personale.'—For the numerous ambiguities which stick to these expressions, see below, note 5.

3. 'Dominium' (sensu latiore) and 'Obligatio.'—Besides the general objection which is mentioned above, *dominium* (as opposed to *obligatio*) differs from *dominium* (in the strict signification). As opposed to *obligatio*, it embraces 'jura in re' (in the sense

TABLE II.
Note 3, C.d.

of the Classical Jurists): that is to say, '*jura in re aliena*:' rights or interests in subjects which are *owned* by others. Taken in the strict signification, it is directly *opposed* to these rights: being synonymous with '*proprietas*,' with '*in re potestas*,' or with '*jus in re propriâ*.' (See Table I.—For the numerous ambiguities which beset the term *obligatio*, see Table I., note 6.)

4. '*Potestas*' and '*Obligatio*.'—It has been proposed to substitute these in the place of *dominium* and *obligatio*, *jus in rem*, and *jus in personam*, etc. But this were a change to the worse. For, first, *potestas*, as synonymous with *dominium*, is encumbered with all the ambiguities which stick to the latter. And, secondly, it is liable to an objection from which the latter is free. For it usually signifies certain *species* of the rights which avail against persons *determinate*: namely, the rights of the master against the slave (—'*potestas dominorum in servos*') ; and the rights of the *paterfamilias* against his descendants (—'*patria potestas*,' or '*potestas parentum in liberos*').

5. '*Absolute rights*' and '*Relative rights*.'—Rights which avail against persons *generally* or *universally*, and rights which avail against persons *certain* or *determinate*, are not unfrequently *opposed* by the names of *absolute* and *relative*. But these expressions, as thus applied, are flatly absurd. For rights of both classes are *relative*: Or, in other words, rights of both classes *correlate with duties or obligations*. The only difference is, that the former correlate with duties which are incumbent upon the world at large; the latter correlate with obligations which are limited to determined individuals.

6. '*Jura quæ valent in personas generatim*,' and '*Jura quæ valent in personas certas sive determinatas*.'—These expressions are sufficiently clear and precise. But they are rather definitions than names, and are much too long for ordinary use. To the purposes of discourse, brevity is just as necessary as distinctness or precision.

7. '*Law of Property*' and '*Law of Contract*.'—These expressions, as thus opposed, are intended to express the distinction which is the subject of the present note. But they do the business wretchedly. Of the numerous objections which immediately present themselves, I will briefly advert to the following.
1°. We need contrasted expressions for the two classes of *rights*,

TABLE II.
Note 3, C.d.

and not for the *laws* or *rules* of which those rights are the creatures. 2°. *Property* is liable to the objection which applies to *dominium*. In this instance, its meaning is *generic*. It signifies rights of *every* description which avail against the world at large. But, in other instances, it *distinguishes* some *species* of those rights from some other *species* of the same rights. For example: It signifies *ownership*, as opposed to *servitude* or *easement*; or it signifies ownership indefinite in point of duration, as opposed to an interest for a definite number of years. In short, if I travelled through all its meanings and attempted to fix them with precision, this brief notice would swell to a long dissertation. 3°. *Contract* is not a name for a class of *rights*, but for a class of the *facts* or *titles* by which rights are generated. 4°. Rights arising from contracts are only a portion of the rights, which the expression 'law of contract' is intended to indicate. For 'law of contract,' as opposed to 'law of property,' denotes, or should denote, rights *in personam certam*: a class which embraces rights *not* arising from contracts, as well as the species of rights which emanate from those sources.

8. 'Jus in *rem*' and 'Jus in *personam*.'—Of all customary expressions for the classes of rights in question, these are incomparably the best. 'Jus in *personam*' (*certam sive determinatam*), is expressive and free from ambiguity. Cut down to *jus in personam*, it is also sufficiently concise. *Jus in rem*, standing by itself, is ambiguous and obscure. But when it is *contradistinguished* from *jus in personam*, it catches a borrowed clearness from the expression to which it is opposed.

Another decisive reason in favour of these terms will be found in the following remarks.

The phrase '*in rem*' is an expression of frequent occurrence. And in all the instances in which it occurs, the subject to which it is applied is a something which avails *generally*: 'quod *generatim* in causam aliquam valet.'

Take the following instance from the language of the English Law.

The *Judgments* of Courts of Justice are evidence against *parties* to the cause, and against the determinate persons (succeeding or representing them) who are styled their *privies*. As against persons who are neither parties nor privies, judgments, speaking generally, are *not* evidence. But certain judgments are excepted from the general principle, and are evidence against *all* persons, or, at least, against the world at large. Accordingly,

TABLE II.
Note 3, C. d.

judgments of this species are marked by a peculiar name: And that peculiar name is, 'judgments *in rem*.'

In this instance, the phrase *in rem*, and the manner of applying it, are manifestly borrowed from the Roman Lawyers. For the latter is analogous to the manner in which they employ the phrase, wherever it occurs in their writings. Whenever they use the phrase, they always intend a something which avails generally or universally: in favour of a determined person against persons indeterminate; or in favour of indeterminate persons against a person determined.—The cases to which they apply it, I omit. For they could hardly be made intelligible, unless I wearied the reader with long and unseasonable explanations.

How the phrase *in rem* came to acquire this meaning, it is not very easy to perceive. It is one of the elliptical expressions with which language abounds, and which too frequently obscure the simplest and easiest notions. In this instance, it might perhaps be possible to restore the links which are dropped: to connect '*res*' (as signifying a *thing*) with '*in rem*' (as signifying *generality*). But I have neither space nor time for merely etymological researches.

To mark the important purpose to which the phrase may be turned, is matter of more moment.

Although it is applied by the Roman Lawyers to a considerable number of cases, they always apply it partially. They nowhere use it for the purpose of signifying briefly and unambiguously, 'rights of *every* description which avail against persons *generally*.' The large generic expression '*Jus in rem*,' is not to be found in their writings.

This expression was devised by the Glossators, or by the Commentators who succeeded them. Seeing that the phrase '*in rem*' always imported *generality*, and feeling the need of a term for '*rights which avail generally*,' they applied the former to the purpose of marking the latter, and talked of '*Jura in rem*.' And, in this instance, as in many others, they evince a strength of discrimination, and a compass of thought, which are rarely displayed by the elegant and fastidious scholars who scorn them as scholastic barbarians. In spite of the *ignorance* to which their position condemned them, their *reason* was sharpened and invigorated by the prevalent study of their age: by that school logic which the shallow and the flippant despise, but which all who examine it closely, and are capable of seizing its purpose, regard with intense admiration.

Now the expression *jus in rem*, in this its analogical mean-

ing, perfectly supplies the *desideratum* which is stated above. For as '*in rem*' denotes *generality*, '*JUS in rem*' should signify *rights* availing against persons *generally*. Therefore, it should signify *all* rights belonging to that *genus*, let their specific differences be what they may. And *that* is the thing which is wanted.

TABLE II.
Note 3, C. d.
Note 4, A.

If it were possible for me to fix the meaning of words, I would distinguish the two classes of rights and obligations in the following manner.

1°. Obligations considered universally, I would style '*Offices*' or '*Duties*.'

2°. Rights which avail against persons *generally* or *universally*, I would style '*Rights in rem*.'

3°. Rights which avail against persons *certain* or *determinate*, I would style '*Rights in personam*.'

4°. Obligations which are incumbent upon persons *generally* or *universally*, I would style '*Offices*' or '*Duties*.'

5°. To those which are incumbent upon persons *certain* or *determinate*, I would appropriate the term '*Obligations*.' (See Table I. note 6.)

Without introducing a single new term, and without employing an old one in a new manner, we should thus be provided with language passably expressive and distinct: which would enable the writer or speaker to move onward, without pausing at every second step to clear his path of ambiguities. All that is necessary to this desirable end, is to use established terms in established meanings, taking good care to use them *determinately*: i.e. to restrict each term to its appropriate object.

[Note 4.] '*Jus IN Re*' et '*Jus AD Rem*:'

(A.) By the Classical Jurists, the expression *jura in re* is opposed to, or contradistinguished from, *dominium*, *proprietas*, or *in re potestas*. (See Table I. and Table II., note 3. C. d. 3.) For example, A servitude over land of which another is the owner, is '*jus in re (aliena)*:' but the right or interest of the owner, is '*dominium*,' '*proprietas*,' or '*in re potestas*.' The interest of the Pledgee or Mortgagee, and the interest of the Pledgor or Mortgagor, are also respectively '*jus in re (aliena)*' and '*dominium*' (or '*proprietas*'). For, in the Roman Law, as in English Equity, the interest of the Mortgagee is considered in the rational light of a mere lien: a *security* for the performance of the *obligation* which is incumbent upon the Mortgagor.

TABLE II.
Note 4. A.,
B. a., B. b.

Consequently, the import of *jus in re*, in the sense of the Roman Lawyers, is comparatively narrow. In *their* writings, 'jura in *ed re*,' 'jura in *re*,' or (more concisely still) '*jura*,' are the *opposite* of 'dominion' or 'property.' They are merely abridged expressions for 'jura in *re aliena*,' as contradistinguished from 'jura in *re propria*.' They are restricted to *such* of the rights, availing against the world at large, as are acquired over property or dominion residing in another person.

By the successors of the Roman Lawyers, the meaning of *jus in re* has been extended. As *they* employ it, '*jus in re*' is synonymous with '*jus in rem*:' sometimes signifying *generally* rights which avail against the world; sometimes signifying *such* of those rights as are rights to determinate *things*. (See Note 3. C. a., C. d.) But this extension of the term is most objectionable. For, first, it is needless and gratuitous: '*jus in rem*' answering the purpose completely. (See Note 3. C. d. 8.) And, secondly, it darkens the technical language of the original and proper authorities. We must restore the term to its narrower and genuine import, before we can follow the expositions of the Roman Lawyers themselves.

(B.) *Jus in re* (in this its extended meaning) is opposed to *jus AD rem*: an expression which was devised in the Middle Ages, and of which there is not a vestige in the writings of the Classical Jurists.

(a.) As opposed to '*jus in re*' (in the modern and extended meaning), '*jus ad rem*' is synonymous with '*jus in personam*.' It embraces *all* rights which avail against persons *certain*. But still it is often used in a narrower signification, and restricted to a *species* of those rights.

(b.) Taken in this its restricted meaning, it answers to the obligation '*ad dandum aliquid*.' It is the right to the *acquisition* of a thing; ° *jus ad rem (acquirendam)*.' Or (speaking more generally and more adequately) it is the *right* of compelling the party, who lies under the corresponding *obligation*, to *pass* a right in *rem*. (See Note 3. B. c., C. b., C. d. 1.)

Take the following examples:

1. If you *contract* with me to deliver me a specific thing, I have not a right *over* or *in* the thing, but a right *to* the thing as against you *specially*. I have not *jus in rem* (or *jus in re*), but *jus AD rem*: a right of compelling you to *give* me *jus in rem*,

or of doing some act, in the way of grant or conveyance, which shall make the thing *mine*.

TABLE II.
Note 4, B.
b., B. c., C.

2. If you owe me money determined in point of *quantity*, or if you have done me an *injury* and are bound to pay me *damages*, I have also a right to the *acquisition* of a thing, or, rather, of compelling *you* to pass me a right *in rem*. I have a right of compelling *you* to deliver or pay me moneys, which are not determined *in specie*, and as yet are not *mine*: though they *will* be determined *in specie*, and *will* become *mine*, by the act of delivery or payment.

3. Suppose that you enjoy a monopoly by virtue of a patent, and that the patent (as generally happens) empowers you to *assign* the monopoly: and suppose, moreover, that you enter into a *contract* with me to transfer your exclusive right in my favour. Now here, also, I have *jus ad rem*; but still I have not a right to a determined *thing*. The object of the contract is neither a determined *thing*, nor a *thing* that can be determined. (See Note 3. C. c. 2.) My right is *purely* this: A right of compelling *you* to transfer a right *in rem* as *I* shall direct or appoint. If I may refine upon the expression which custom has established, I have not so properly '*jus ad rem*' as '*jus ad (jus in) rem*.'

(c.) It is manifest that the expression '*jus ad rem*' ought not to be substituted for '*jus in personam*.' It is merely an abridged expression for '*jus ad rem acquirendam*:' and it properly denotes rights, which are rights to the *acquisition* of a *thing*, or (speaking more generally and adequately) to the *acquisition* of a right *in rem*. But many of the rights which avail against persons *certain*, are not of that character: They have not the acquisition of a thing (or, rather, of a right *in rem*) as their purpose or scope. For example: If you contract with me to *perform work and labour*, or if you contract with me to *forbear from some given act*, the contract gives me a right which properly is '*jus in personam*,' but which it were impossible to denominate '*jus ad rem (acquirendam)*,' without a glaring departure from the appropriate import of the expression.— '*Jus ad rem*' should clearly be restricted to a *species* of rights *in personam*.

(C.) With a view to the study of the Roman Law, or of any of the modern systems which are offsets from the former, it is highly expedient (or, rather, absolutely necessary) to dis-

TABLE II.
Note 4, C.a.

tinguish 'jus ad rem,' in its broad and improper meaning, from 'jus ad rem' (or, rather, '*ad rem acquirendam*'), in its restricted and correct signification. The neglect of this simple precaution has engendered the grossest error: has darkened the fair face of the Roman Law; and covered the arrangement of the Prussian and French Codes with a mist which is scarcely penetrable.

As the matter is intimately connected with the subject of the present note, I will try to explain briefly the flagrant error which I have mentioned, and to dispel or attenuate the obscurity of which that error is the source.

(a.) The acquisition of a right *in rem*, is commonly or frequently preceded by *jus AD rem* (in its restricted and correct signification). This is generally the case, whenever the right *in rem* is acquired by virtue of an *alienation*: e.g. by virtue of *tradition* (or delivery), or by virtue of grant or conveyance *not* accompanied with tradition.

The cases which I have supposed in the last section (B. b.), are cases of the sort. In the *first* of those cases, the right *in rem* is acquired by tradition or delivery, or by conveyance without tradition: and the acquisition is preceded by *jus AD rem* arising from contract or agreement. In the *third* case, the nature of the acquisition is such that tradition is impossible. The mode of acquisition is conveyance without tradition; and the preceding *jus AD rem*, with the correlating or corresponding obligation, arises, as before, from contract. In the *second* case, the mode of acquisition is simple tradition or payment; and the preceding *jus AD rem*, with the correlating or corresponding obligation, arises from an injury. In other cases, the preceding *jus AD rem*, with the correlating or corresponding obligation, arises from *quasi-contract*.

Observing that the acquisition of *jus in rem* is preceded in certain cases by *jus AD rem*, many of the modern Civilians generalised hastily and rashly, and fell into the following errors.

1. They inferred from those cases (which are striking by their frequency and importance), that *every* acquisition of *jus in rem* is preceded by *jus AD rem* and by a correlating or corresponding obligation. And this (as they supposed) *invariable* antecedence, they denoted in the following manner. To the fact or incident imparting *jus in rem*, they gave the name of '*modus acquirendi*,' or '*modus acquisitionis*.' To the preceding incident imparting *jus AD rem* (which they considered as a *step* or *means* to the acquisition of *jus in rem*), they gave the

TABLE II.
Note 4, C. a.
C. b., C. c.

name of '*titulus ad acquirendum*,' or (simply and briefly) '*titulus*.' For example: According to their language, a *contract* to deliver a thing is '*titulus ad acquirendum (jus in rem)*': The *delivery* or *tradition* which follows it, or by which it ought to be followed, is '*modus (jus in rem) acquirendi*' or '*modus acquisitionis*.'

2. From this first error they fell into a second. Having supposed that *jus in rem* is *invariably* preceded by *jus AD rem*, they supposed that the latter has no independent existence, but is merely a forerunner of the former. Or (changing the expression) they supposed that the acquisition of *jus in rem* is *always* the scope or object of *jus AD rem* and of the *obligation* to which it answers. Or (changing the expression again) they supposed that *every* incident which imparts *jus AD rem* is '*titulus ad acquirendum (jus in rem)*.' And if the expression *jus AD rem* be taken in its restricted signification, the supposition is just. But, *confounding its restricted signification with its broad and improper meaning*, they extended the supposition to *every right in personam* and to every possible *obligation*. They supposed that '*jus ad rem*' (as synonymous with '*jus in personam*') has *always* the acquisition of *jus in rem* for its scope, purpose, or object: that *every* incident, which imparts '*jus in personam*,' is merely '*titulus ad (jus in rem) acquirendum*,' or is merely *preparatory* to a *modus acquisitionis*. The falsity of which supposition is gross and palpable. (See above, in the present note, B. c.)

Briefly stated their errors were these:

1. They supposed that '*jus in rem*' (with the *mean* by which it is acquired) is *always* preceded by '*jus in personam*' (and by a fact or incident imparting it). 2. They supposed that '*jus in personam*,' in every case whatever, is the forerunner of '*jus in rem*:' that the fact or incident, which gives '*jus in personam*,' is *always* a *title* to the *acquisition* of '*jus in rem*,' or is *always* preparatory to a *modus acquisitionis*.—The *former* of these errors, combined with the varying extension of '*jus ad rem*,' naturally led to the *latter*.

(b.) The influence of the *latter* upon the Prussian and French Codes is most remarkable. I therefore reserve the further consideration of it for the notes which I purpose annexing to Tables V. and VI.¹⁴

(c.) As proofs of the extent to which the *former* obtained,

¹⁴ Some remarks on the Prussian and French Codes will be found in a later part of this volume.—S. A.

TABLE II.
Note 4, C.c.

I extract the following passage from *Heineccius*: the most renowned, and, perhaps, the most authoritative of the Civilians, who flourished in the eighteenth century.

The passage (which, for the sake of facilitating apprehension, I break down into short and distinct paragraphs) is taken from his excellent *Recitations*: Lib. ii. tit. 1. § 339. (See also his '*Elements* according to the *Institutes*': Lib. ii. tit. 1. § 339.)

'Quod adinet ad quæstionem *quid sit modus acquirendi*? cavendum est, ante omnia, ne confundamus *titulum* et *modum acquirendi*: quippe qui toto cælo differunt.

'*Omne enim dominium duplicem habet causam: proximam, per quam immediate dominium consequor; et remotam, per quam et propter quam mediate fio dominus. E.g.*: Si rem a domino emi, et hic mihi rem emtam tradit, dominus fio: Et tunc traditio est *caussa dominii proxima*; emtio autem, *caussa remota*.

'*Causa dominii proxima vocatur modus acquirendi; causa autem remota, titulus.*

'Et hi etiam effectu differunt. Nam per *titulum* tantum consequor *jus ad rem*: per *modum acquirendi* *jus in re*. Ex *titulo* ago *in personam*; adversus eum quocum mihi negotium fuit: ex *modo acquirendi* ago *in rem*; adversus quemcumque possessorem. *E.g.*: Liber a bibliopolâ primum mihi, deinde Titio venditus est: posteriori etiam traditus. Quæritur, an ego, qui prior emi, adversus Titium agere et librum prius emtum vindicare possim? Negatur. Nam qui emit, jam tum *titulum* habet; nondum autem rem *adquisivit*: Adeoque nec in rem agit adversus quemcumque possessorem; quia *jus in re* nullum habet. Ergo agere debeo adversus bibliopolam, quocum mihi negotium fuit, ad implendum contractum; vel, si adimplere nequeat, ad id quod interest.

'Notandum itaque hic axioma: *titulus* nunquam dat *jus in re*, sed debet accedere *traditio*.

'Ergo sive emerim, sive res mihi legata, donata, permutata sit, nondum tamen sum dominus, antequam *traditio* accedat: quæ *sola* transfert *dominium* vel *jus in re*, modo præcesserit *TITULUS ad transferendum dominium habilis*.

'Ergo nec *titulus* sufficit sine *traditione*, nec *traditio* sine *titulo*:—Axioma regnans per universum *jus*, et probe infigendum *memoriæ*.'

If you examine this passage closely, and take its parts in conjunction, you will find it involving the following assumptions: 1. That *every* acquisition of *dominium*, or *jus in rem*, consists of

two degrees: One of them being the *proximate*; the other, the *remote* cause of the right: One of them, *modus acquirendi* (strictly so called); the other, *titulus*, or *titulus ad acquirendum*. 2. That the *titulus*, or *remote* cause of the right, *always* consists of an incident imparting *jus in personam*: *E.g.* a contract. 3. That the *modus acquisitionis* or *proximate* cause of the right, is *always* tradition and apprehension.

TABLE II.
Note 4, C.c.

Now each of these assumptions is grossly false: and truly wonderful it is, that the learned and clear-sighted jurist, who wrote the passage which I have copied, fell into the strange errors with which it abounds.

I will examine these assumptions in succession.

1. It is *not* true, that *every* complete acquisition of *dominium*, or *jus in rem*, is divisible into a *modus acquirendi* and a *titulus ad acquirendum*.

There are two cases, and only two, in which ACQUISITION is *opposed* to TITLE by the Roman Lawyers: namely, the case of *tradition*, and the case of *usucapion*.

According to their system, every tradition or delivery, which gives '*jus in rem*,' is preceded by an *obligation* (or by '*jus ad rem*'). Considered with reference to that preceding obligation, the tradition or delivery is denominated *modus acquirendi*, or, briefly, *acquisitio*. Considered with reference to the following tradition, the contract, or other incident, which creates the obligation, is styled '*justus titulus*,' '*justum initium*,' '*justa causa*': *i.e.* the legally operative *inducement* to the subsequent *modus acquirendi*.—'*Nunquam enim nuda traditio transfert dominium: sed ita; si venditio aut alia justa causa præcesserit, propter quam traditio sequeretur.*'

The effect of *usucapion* (a *species* of *præscription*) is this: It cures the fault which vitiates tradition or delivery, where the party, from whom the delivery proceeds, has not the right *in rem* which he affects to transfer. Here, the tradition, by itself, is inoperative: though, coupled with subsequent possession on the part of the alienee, it may give him the right *in rem*, after a certain interval. But in order that the alienee may benefit by his subsequent possession, *bona fides* is requisite. His subsequent possession works nothing, or, in other words, there is no *usucapion*, unless he believes, at the time of the delivery, that the person affecting to alien is competent to pass the right. But this he can scarcely believe, unless the tradition or delivery be made in

TABLE II.
Note 4, C.c.

the legal manner: unless the tradition or delivery *would* transfer the right, supposing that the party who makes it *had* the right to transfer. Consequently, '*justus titulus*,' '*justum initium*,' or '*justa causa*,' is a condition precedent to usucapion. For it necessarily precedes the tradition by which the possession is preceded, and upon which the possession operates. The contract which is the inducement to the tradition, is the *titulus ad acquirendum*: The vicious tradition, and the possession which purges it of the vice, constitute the *modus acquirendi*.

Now, in these cases, the division of the entire acquisition into a *mode of acquisition*, and a *title to acquire*, is intelligible. But, in many cases, it were utterly senseless. Take, for example, the case of *Occupation*: i.e. acquisition, by *apprehension* or *seisin*, of a subject which belongs to no one (*—res nullius*). Here, the entire acquisition is a simple and indivisible incident. You may call that simple incident a *mode of acquisition*, or you may call it a *title*. But to split it into a mode of acquisition *and* a foregoing title, is manifestly impossible.

The truth is, that Heineccius and other Civilians arrived at their general inference through a narrow and hasty induction. When they affirmed generally, 'that a *mode of acquisition* supposes a foregoing *title*,' their attention was directed exclusively to *tradition* preceded by *contract*. This is the only example adduced in the passage which I have copied, to support or illustrate the proposition. And, in cases of that class (and also of some other classes), the proposition holds universally. Or (speaking more accurately) the proposition holds universally in cases of that class, if we look exclusively at the doctrine of the *Roman Lawyers* with regard to the *essentials of the tradition*.

Their doctrine seems to be this:

The tradition is not sufficient to pass an irrevocable right, unless the preceding contract *bind* the alienor, and therefore impart to the alienee *jus AD rem*. In other words, the tradition is not sufficient to pass the right irrevocably, unless the preceding contract amount to '*justus titulus*:' '*titulus ad transferendum dominium habilis*.' Accordingly *every* acquisition by delivery, made in pursuance of a contract, is divisible into *two* degrees: a *mode of acquisition* and a *title to acquire*.

But, according to other systems (as, for instance, the English), acquisition by tradition or delivery, made in pursuance of a contract, is not *always* divisible into those distinct degrees.

Take the following example :

You sell me a house or field. The contract, however, is not reduced into writing, and therefore is void by the Statute of Frauds. But though you are not obliged to perform the contract, you convey the house or field, agreeably to the terms of the contract, by livery or feoffment.

TABLE II.
Note 4, C.c.

Now, here, I acquire the subject through tradition preceded by contract. But yet it were impossible to split the entire acquisition into a *mode of acquisition* and a *title to acquire*. The acquisition in this instance, like that by occupation, is a simple and indivisible incident. In consequence of the livery and feoffment, I acquire an indefeasible right *in* or *over* the subject: *dominium*, or *jus in rem*, which is not revocable by you. But my right commences at the moment of the acquisition. Before the acquisition, I am not invested with *jus ad rem*, nor is there a corresponding *obligation* incumbent upon you. There is not the shadow of '*justus titulus*' from the beginning to the close of the transaction.

The exceptions which I have mentioned are amply sufficient to demonstrate, that *every* acquisition of *jus in rem* is *not* divisible into a *mode of acquisition* and a preceding *title to acquire*.

There is, however, a class of cases, which will also serve to demonstrate the same truth, and which I am desirous of noting for another reason: namely, that they somewhat obscure that strong line of demarcation by which '*jus in rem*' is separated from '*jus in personam*,' and which should be seized distinctly by every *student of law* who aspires to master its principles.

Rights *in rem* sometimes arise from incidents which are styled *contracts*. The meaning of which seeming contradiction is this: that the incidents in question wear a double aspect, or are followed by a twofold effect. To *one* purpose, an incident of the sort gives '*jus in personam*,' and, therefore, is a *contract*: to *another* purpose, it gives '*jus in rem*,' and, therefore, is a *conveyance*. In a word, the incident combines the properties of a contract *and* a conveyance; but, by one of those *ellipses* which are at once so commodious and so perplexing, it is styled, briefly, '*a contract*.'

In the cases which I have now mentioned, the incident combines the properties of a contract *and* a conveyance, and is styled a contract *simply* for the sake of brevity. In other cases, the so-called contract is a pure conveyance or transfer, and is

TABLE II.
Note 4, C.c.

styled a *contract* by a mere abuse of language, and through a confusion of ideas which are utterly disparate and distinct.

Take the following examples of these several cases: viz. the cases wherein the incident is styled a *contract* by an ellipse; and the cases wherein the incident is styled a *contract* by a solecism.

According to English *Equity* (i.e. according to the *Law* which certain of our Courts administer), a sale and purchase, although it is styled a *contract*, imparts to the buyer, without more, *dominion* or '*jus in rem*.' In the technical language of the system, 'what is agreed to be done is considered as done.' The subject of the sale is his, as against the seller specially; and the subject is also his, as against the world at large. The only interest in the subject, which remains to the seller, is a right '*in re aliend*:' a mortgage or lien expressly or tacitly created, to the end of securing the equivalent for which he has aliened.

But, according to the antagonist system which is styled pre-eminently *Law*, a sale and purchase, without more, merely imparts to the buyer '*jus ad rem*.' The seller is *obliged* by the sale to transfer the subject to the buyer, and in case he break his *obligation*, by refusing or neglecting to transfer, the buyer may sue him on the breach, and recover compensation in damages. But that is the extent of the right which the sale imparts. The property or dominion of the subject still resides in the seller, and, in case he convey the subject to a third person, the property or dominion passes to the alienee.

Now, if the antagonist *Law* were fairly out of the way, the right of the buyer, according to *Equity*, would stand thus. Unless the seller refused to deliver the subject, and the buyer, in that event, were satisfied with his right to compensation, the sale and purchase, though styled a *contract*, would give him completely and absolutely *dominion* or '*jus in rem*.' He could *vindicate* or recover the subject as against the seller himself, and as against third persons who might happen to get the possession of it. The so styled *contract* would amount to a perfect conveyance.

But, by reason of the dominion or property which remains to the seller at *Law*, the sale and purchase, even in *Equity*, is still imperfect as a conveyance. In order that the dominion of the buyer may be completed in every direction, something must yet be done on the part of the seller. He must pass his *legal*

interest in *legal* form. He must convey the dominion or property, which still resides in him *at Law*, according to the mode of conveyance which Law, in its wisdom, exacts.

TABLE II.
Note 4, C.c.

To this special intent or purpose, the buyer, even in Equity, has merely '*jus in personam*.' Or (borrowing the language of the Roman Lawyers) the subject of the sale, even in Equity, 'continues in *obligatione*.'

Speaking *generally*, the buyer, in contemplation of Equity, has *dominion* or '*jus in rem*.' And, speaking *generally*, the sale, in Equity, is, therefore, a *conveyance*.

But, to the *special* intent or purpose which is mentioned above, the buyer has '*jus in personam*.' Or (changing the shape of the expression) the seller remains *obliged*. This right in *personam certam*, and this corresponding *obligation*, Equity will enforce *in specie*. And, in respect of this right in *personam*, and of this corresponding *obligation*, the sale, even in Equity, is, properly, a *contract*.

According to the Roman Law *dominium* or *jus in rem* is not transferred by tradition, unless it be preceded by contract, or by other *titulus*. '*Nunquam enim nuda traditio transfert dominium: sed ita; si venditio, aut alia justa causa præcesserit, propter quam traditio sequeretur.*'

And, conversely, *dominion* or *jus in rem* is not transferred by contract, unless it be followed by tradition. '*Traditionibus et usucapionibus, non nudis pactis, dominia rerum transferuntur.*'

This rule or maxim had been imported from the Roman into the French Law: And it formed a portion of the latter to the time of the Revolution. A contract to deliver a thing (or to pass a right in *rem*), imparted to the obligee '*jus ad rem*,' or imposed upon the obligor an *obligation* to transfer or convey. But *dominion* or '*jus in rem*' was not acquired by the former, till the contract to pass the right was completed by consequent tradition.

'Dans l'ancienne jurisprudence, pour qu'une obligation transmitt la propriété, elle devait être suivie de la tradition. Celui qui achetait une maison, par exemple, n'en devenait propriétaire que du moment où la maison lui était livrée: si elle était livrée à une autre personne, c'était cette personne qui l'acquerrait. L'obligation n'était alors qu'un titre pour se faire donner la propriété; le moyen d'acquérir cette propriété était la tradition.'—See 'Code civil expliqué par ses motifs et par des exemples,' par J. A. Rogron, Avocat aux Conseils du Roi et à la Cour

TABLE II. de Cassation: Paris, 1826. (Note by *M. Rogron* to Article
 Note 4, C.c. 711.)

But, according to the Code which now obtains in France, the dominion of a subject, belonging to the class of *immovables*, passes to the buyer by the so-called *contract*. Or (in the exquisitely absurd language of the Code and its Commentators) the right *in rem* passes to the buyer by the *obligation* which the contract creates.

‘*La propriété des biens s’acquiert et se transmet par succession, par donation entre-vifs ou testamentaire, et par l’effet des obligations.*’ (Code civil, article 711.)—‘Aujourd’hui on peut avoir la propriété, c’est-à-dire le droit de posséder, quoi qu’on ne possède pas réellement. Aussi est-elle transmise *par la seule force de l’obligation*, sans qu’il soit nécessaire qu’il y ait eu tradition.’ (Note to Article 711, by *M. Rogron*.)

‘L’obligation de donner emporte celle de livrer la chose,’ etc. (Code civil, article 1136.)

‘L’obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le créancier (*i.e.* the obligee) *propriétaire*.’ (Code civil, article 1138.)—‘Ainsi l’obligation donne au créancier le droit sur la chose *jus in re*; et, par suite, *l’action réelle*, ou *revendication*: c’est-à-dire, le droit de forcer tout détenteur de la chose que nous appartenait à nous la rendre.’ (Note to Article 1138, by *M. Rogron*.)

‘Les effets de l’obligation de donner ou de livrer *un immeuble* sont réglés au titre de la vente et au titre des privilèges et hypothèques.’ (Code civil, article 1140.)

‘La vente est *une convention* par laquelle l’un *s’oblige* à livrer une chose et l’autre à la payer.’ (Code civil, article 1582.)

‘La vente est parfaite* entre les parties, et *la propriété est acquise* de droit à l’acheteur à l’égard du vendeur† dès qu’on est convenu de la chose et du prix, quoique la chose n’ait pas encore été livrée ni le prix payé.’ (Code civil, article 1583.)—* ‘*Parfaite*. Cette disposition est la conséquence de l’article 711, portant que la propriété est transférée par l’effet des obligations; c’est-à-dire sans qu’il soit, comme autrefois, besoin de tradition.’ (Note to article 1583, by *M. Rogron*.)—† ‘*A l’égard du vendeur*. Mais non à l’égard des tiers qui peuvent avoir sur la chose vendue des droits *antérieurs* à la vente. Par exemple, si le vendeur n’était pas véritable propriétaire de la chose, celui auquel elle appartient conserverait le droit de la revendiquer.’ (Note to Article 1583, by *M. Rogron*.)

If, then, the subject of the sale belong to the class of *immov-*

ables, dominion or '*jus in rem*' passes from the seller to the buyer independently of tradition. But, if the subject be *movable*, the buyer, without tradition, has merely '*jus ad rem*.' He has no right to the subject against a third person, unless the third person be *in mala fide*, or has gotten possession of the subject with notice of the buyer's *titulus*.

TABLE II.
Note 4, C.c.

'Si la chose qu'on s'est obligé de donner ou de livrer à deux personnes successivement est purement mobilière celle des deux qui en a été mise en possession réelle est préférée, et en demeure propriétaire, encore que son titre soit postérieur en date; pourvu toutefois que la possession soit de bonne foi.' (Code civil, article 1141.)—'Je vous vends ma montre: d'après le principe consacré dans les articles 711 et 1138, vous en devenez à l'instant propriétaire, bien que je ne vous l'aie pas livrée. Cependant je la vends demain à Pierre, et je la lui livre: elle doit lui rester, car il a été mis en possession réelle. Ainsi, en matière de meubles, la tradition est encore nécessaire pour transférer la propriété. Cette exception au principe général est basée sur la circulation des meubles, qui peuvent passer, dans le même jour, dans vingt mains différentes, et sur la nécessité de prévenir les circuits d'actions et les nombreux procès qui en résulteraient.' (Note to Article 1141, by *M. Rogron*.)

Now according to the Articles of the Code which I have copied and collated above, the actual Law of France, with regard to the matter in consideration, would seem to stand thus.

If the subject of the sale be *movable*, the sale, when unaccompanied by tradition, is properly a *contract*. The buyer has '*jus ad rem*,' but not '*jus in rem*.' He has a right to the subject of the sale as against the seller specially, but he has no right to the subject as against the world at large. There is room for the distinction between *contract* and *conveyance*: between *title to acquire* and *mode of acquisition*.

But, in case the subject of the sale belong to the class of *immovables*, the sale, though unaccompanied by tradition, is, properly, a *conveyance*. The sale imparts to the buyer *dominion* or *jus in rem*; and it, therefore, gives him a right to *vindicate* or recover the subject from *any* who may be in the possession of it. There is no room for the distinction between *contract* and *conveyance*; between *title to acquire* and *mode of acquisition*. There is no room for '*justus titulus*:' '*justa causa*;' '*justum initium*.' For this supposes an *acquisition* to which it is the prelude: And the buyer *acquires* the subject, by the sale itself, as completely as he can acquire it. He *has* the dominion of

TABLE II.
Note 4, C.c.

the subject, although he has not the possession: And, by exercising a right of action annexed to his dominion, he may get the possession if he will.

In a word, the right which belongs to the buyer, according to the French Code, is the right which *would* belong to him, according to English *Equity*, if the system were not embarrassed by the conflicting provisions of *Law*.

To style the sale a *contract*, is a gross solecism. It is, however, a solecism which may be imputed to the Roman Lawyers; and with which it were not candid to reproach the Authors of the Code.

But when they talk of *obligations* as imparting *dominion* or *property*, they talk with absurdity which has no example, and which no example could extenuate. If they had understood the system which they servilely adored and copied, they would have known that obligation excludes the idea of dominion: that it imparts to the obligee '*jus in personam*,' and '*jus in personam*' merely. *This* is its essential difference: *This* is the very property which gives it its being and its name. '*Obligationum enim substantia non in eo consistit ut aliquod nostrum faciat, sed ut alium nobis obstringat ad dandum aliquod, vel faciendum, vel præstandum.*'

There are, indeed, purposes, as to which the sale is a contract: and, in respect of which, it is justly styled a contract. For example: The seller is *obliged* by the sale to deliver the subject to the buyer agreeably to their common intention. And, in case it be not delivered agreeably to that common intention, the buyer may sue the seller for breach of the *obligation*, and recover compensation in damages. (Code Civil, Article 1146 *et seq.*) But the *dominion* or *jus in rem* which the sale imparts to the buyer is *not* a right answering to an obligation *specially* incumbent upon the seller. Considered as imparting *dominion*, the sale is a *conveyance*: and it cannot be styled a *contract*, without an impropriety in speech.

According to the Roman Law, *jus in rem* is not transferred by contract, unless the contract be followed by tradition or delivery. But to this general principle there are numerous exceptions. For example: An *hypotheca* or mortgage is sufficiently created by *pact*, although the subject be not delivered, but remain in the possession of the mortgagor. In other words, the intention to create the mortgage, expressed orally or in writing, imparts to the mortgagee *jus in re aliena*. The ex-

pression of this intention on the part of the mortgagor is styled a pact or convention. But, though it is adjected to a convention, it is not a convention of itself. Imparting to the mortgagee *jus in rem*, it is, properly, a conveyance.

TABLE II.
Note 4, C.c.

The confusion of *contract* and *conveyance*, by elliptical or improper expression, is one of the greatest obstacles in the way of the student. And, labouring to clear it up by apt and perspicuous examples, I have wandered at some length from the subject which I am directly considering. I now revert to that subject, and dismiss it with the following remark:—

Wherever *jus in rem* is acquired by a so-styled *contract*, the acquisition is not to be distinguished into *titulus* and *modus acquirendi*. That which might be *titulus*, supposing there were room for the distinction, transfers the *jus in rem* as completely as it can be transferred.

2. It is *not* true (as *Heineccius* and others have assumed), that every *title* to the acquisition of '*jus in rem*' consists of some incident imparting '*jus in personam*,' and, therefore, imposing an *obligation* upon a person or persons *determinate*.

As I have remarked above, there are two cases, and only two, wherein *title to acquire* and *mode of acquisition* are expressly distinguished and opposed by the Roman Lawyers themselves: viz. the case of *tradition* and the case of *usucapion*. Where '*jus in rem*' is acquired by *tradition*, the acquisition is divisible into *titulus* and *modus acquirendi*: The *titulus* being always an incident imparting '*jus in personam*,' and, therefore, imposing an *obligation*. Where '*jus in rem*' is acquired by *usucapion*, the acquisition is divisible in the like manner; The *titulus* being commonly an incident, or commonly supposing an incident, of the like quality or effect.

But the difference between *title to acquire* and *mode of acquisition* is not confined to the two cases wherein the Roman Lawyers have expressly taken the distinction.

Whenever the acquisition is divisible into two *distinct* events, we may find it necessary to distinguish them, and to mark them with distinguishing names. And, in every case of the kind, we may mark them, if we will, with the names which are now in question. We may style the fact or event with which the acquisition begins, the *title to acquire*. We may style the fact or event by which the acquisition is completed,

TABLE II.
Note 4, C. c.

the *mode of acquisition*. We may say that the latter is the *proximate* cause of the right, or is *that* through which the latter is *immediately* acquired. We may say that the former is the *remote* cause of the right, or is *that* through which the right is acquired *mediately*. We may style the former the *titulus*, *initium*, or *causæ*, to which the latter is indebted for its investitive operation or effect.

Now the cases wherein the acquisition is divisible into two events, and wherein we may find it necessary to distinguish those distinct events, are numerous. And, in many of these numerous cases, the fact or event with which the acquisition begins, is *not* a fact or event imparting *jus in personam*.

I will try to illustrate these positions by simple and plain examples.

The cases wherein *usucapion* most frequently obtains, are those which I have mentioned above: viz. cases of alienation by tradition or delivery, without right on the part of the alienor. And, in these cases, the *titulus* consists of an incident imparting *jus in personam*.

But usucapion sometimes obtains without an incident of the sort, and is nevertheless distinguished by the Roman Lawyers themselves into *title* and *mode of acquisition*. For instance, In case I *occupy* a subject which I believe to be *res nullius*, but which, in truth, belongs to another person, I acquire the subject (after a certain interval) by continued and undisturbed possession. Now here the acquisition is divisible into *mode of acquisition* and *title*, and yet there is no incident creating an *obligation*. My continued and undisturbed possession constitutes the *mode of acquisition*. My seisin or apprehension of the subject *animo mihi habendi*, coupled with my belief at the time that the subject is *res nullius*, constitutes my *title to acquire*. Without apprehension or seisin accompanied by *bona fides*, no usucapion obtains. Consequently, the apprehension *bona fide* is the remote cause of the right, although the subsequent possession is the proximate or direct.

Restricting the distinction in question as the Roman Lawyers have restricted it, an obligation is not created by *every* title to acquire. (Vide Dig. lib. xli. tit. 3, 4, 5, 6, 7, 8, 9, et 10.)

Succession *ab intestato*, according to the Roman Law, is governed in different cases by different principles.

In certain cases, the heir acquires the heritage *ipso jure*: that is to say, he acquires the heritage, without an act of his own, at the moment of the intestate's decease. To borrow an expressive phrase from the old French Law, '*le mort saisit le vif*.' If the heir survive the intestate a single instant, the heritage vests in the former and devolves to his own representative.

TABLE II.
Notes 4, C.c.

In other cases, the acquisition of the heritage commences at the death of the intestate, but is completed by the acceptance of the heir. At the moment of the intestate's decease, he has *jus hereditatem adeundi*: But he actually acquires the heritage *hereditatem adeundo*. At the moment of the intestate's decease, he has *jus delatum*: But until he signifies his acceptance expressly or tacitly, he has not *jus acquisitum*. If he die without acceptance, his right (generally speaking) is not transmitted to his representative, but the party who takes the heritage takes it as heir to the intestate. The principle by which the transmission is here determined, is analogous to a principle ('*seisina facit stipitem*') which obtains in our Law of Descents.

Now where the acquisition of the heritage is completed by the acceptance of the heir, the facts or events which constitute the acquisition must be divided into two parcels. And these we may style, if we will, *titulus* and *modus acquirendi*. For, if we understand that distinction as the Roman Lawyers understood it, it will hold in every case wherein the acquisition is *gradual*, provided the degrees be two, and be perfectly distinct from one another. In the widely differing cases wherein they took the distinction, there must be some common circumstance to which the distinction may be referred: And the only common circumstance which I am able to discover, is the divisibility of the entire acquisition into two distinct degrees.

Supposing we take the distinction in the case immediately before us, the terms will apply thus:

The *titulus* consists of the facts whereby the right is *deferred*: namely, the intestacy, the death of the intestate, the survivorship of the heir, and his relation to the deceased. The *modus acquirendi* consists of the event whereby the acquisition is completed: namely the acceptance of the right which is deferred.

3. It follows from what has preceded, that apprehension or seisin, consequent upon tradition or delivery, is not *invariably* an ingredient in the acquisition of *jus in rem*.

TABLE II.
Note 4, C.c.

In various cases of *usucapion*, and also in the case of *occupa-tion*, the subject is not apprehended in consequence of tradition. And where the right is acquired by a so-styled *contract*, the possession of the subject frequently continues with the party by whom the right is conveyed.

The acquisition of the heritage by the heir is equally in point. Whether he acquire by testament or in consequence of intestacy, *ipso jure* or *hereditatem adeundo*, he acquires without tradition and without apprehension. So completely foreign is apprehension to the acquisition of the heritage as a whole, that, though that general acquisition gives him the right of *vindication*, it gives him none of the remedies which are founded upon the *right of possession*. By the acquisition of the heritage as a whole, he acquires the dominion of the single or several things which are constituent parts of the heritage. By virtue of that general acquisition, he can *vindicate* any of those things against any who may detain it from him. But until he obtains the possession by a distinct act of apprehension, he is unable to recover it by any of those *interdicts* which are purely possessory remedies.

Acquisition by *mancipation* is commonly in the same predicament, if the subject of the conveyance be immovable (— *prædium*). There is no tradition of the subject on the part of the alienor, no apprehension of the subject on the part of the alienee. The conveyance imparts to the latter the dominion of the absent *prædium*, and gives him that right of *vindication* which dominion or property supposes. But it gives him none of the remedies which are purely possessory. Before he can exercise these in reference to the subject of the mancipation, he must acquire the actual possession, with the consequent *jus possessionis*, by a distinct act of apprehension.

Here I close my remarks upon '*titulus et modus acquirendi*.' I have insisted upon this celebrated distinction at considerable length, for the purpose of dispelling the darkness cast upon the Roman Law by the current though false theory which I have stated and examined above. I am convinced by my own experience, that few of the difficulties, inherent in the study of the system, equal the difficulties induced upon it by that groundless and absurd conceit.

Before I proceed to the matter of the ensuing note, I will briefly interpose a remark suggested by the subject of the present.

By English Lawyers, and even by English conveyancers, 'title' is often used as if it were synonymous with 'right.' But when it is used correctly, it signifies the fact, simple or complex, through which the party entitled was *invested* with a right:—the *means* by which he acquired it. In a word, 'title' is synonymous with 'investitive fact or event.'

TABLE II.
Note 4, C.c.
Note 5, 1.

Tradition and usucapion are the only cases wherein the Roman Lawyers employ the term 'title' to signify an investitive fact. And, in those two cases, it is not, properly speaking, the name of an investitive fact, but it denotes a constituent part of a *complex* investitive fact. It denotes the fact by which the acquisition begins, as contradistinguished from the fact by which the acquisition is completed. And, on the other hand, 'mode of acquisition,' as used in those cases, loses its usual import. It is not synonymous with 'investitive fact,' but it denotes a constituent part of a *complex* investitive fact. It denotes the fact by which the acquisition is completed, as contradistinguished from the fact by which the acquisition begins.

The entire fact, simple or complex, through which the party entitled was invested with a right, is styled, in the language of the Roman Law, '*modus sive causa acquirendi*,' '*species sive genus acquisitionis*,' or simply and briefly, '*acquisitio*.'

Consequently, the 'title' of the English, and the '*modus sive causa acquirendi*' of the Roman Law, are synonymous names. Each of them is equivalent to 'investitive fact or event:—the term which has been suggested by Mr. Bentham.

'Title' is sometimes used by the English Lawyers in a meaning which is somewhat different. Properly speaking, the Vendor's title merely consists of the fact by which his right was acquired. But the so-called *title* which he submits to the inspection of the Purchaser, usually embraces more: viz. all such other titles as may elucidate the quality of his own, or may show the extent of the right which he affects to transfer. (See Sugden's Law of Vendors, etc. ch. vii.)

[Note 5.]—'*Jus REALE sive Jura REALIA*' et '*Jus PERSONALE sive Jura PERSONALIA*:'

In the language of modern Civilians, and in the language of the various systems which are offsets from the Roman Law, rights availing against persons *universally* or *generally*, and rights availing against persons *certain* or *determinate*, are not unfrequently denoted by the distinctive names of '*jus reale*' and '*jus*

TABLE II.
Note 5, 1, 2.

personale.' The adjective *reale* being substituted for '*in rem*;' and the adjective *personale* for '*in personam*.'

These expressions are so ambiguous, that the following cautions may be useful to the Student.

'*Jus reale*' and '*jus personale*,' which signify rights *in rem* and rights *in personam*, must not be confounded with '*jus rerum*' and '*jus personarum*:' i.e. '*law of things*' and '*law of persons*.' (For the import of these last-mentioned expressions see above, Note 2: The Digression in Note 3, at C. b.: Table III. Note 3: and Table IV. Section 2.) The *law of things*, and the *law of persons*, are, both of them, conversant about *rights*, real and personal.

2. The distinction of the Civilians between *real* and *personal* rights, must not be confounded with the distinction of the English Lawyers between *real* property or interests and *personal* property or interests. *Real* rights (in the sense of the English Lawyers) comprise rights which are *personal* as well as rights which are *real* (in the sense of the Civilians): And *personal* rights (in the sense of the former) embrace rights which are *real* as well as rights which are *personal* (in the sense of the latter). The difference between *real* and *personal* (as the terms are understood by the Civilians) is essential or necessary. It runs through the English Law, just as it pervades the Roman: Although it is obscured in the English by that crowd of gratuitous distinctions which darken and disgrace the system. But the difference between *real* and *personal* (in the sense of the English Lawyers), is accidental. In the Roman Law, there is not the faintest trace of it.

In *one* instance, the term *real*, as used by the English Lawyers, bears the import which is usually annexed to it by the Civilians:

An agreement between parson and landowner discharging land from tithes, was formerly binding upon the parson and also upon his successors in the cure, if made with the consent of the patron and with the concurrence of the ordinary. And such an agreement was and is styled '*a composition real*.' Why? Because it availed *generally* against incumbents of the benefice, and was not simply binding upon the parson who entered into it. Because, in short, it operated *in rem*, and not *in personam* merely.

I think that the term *real*, as used by the English Lawyers, bears the last-mentioned import in two or three instances more. But, at this moment, I am unable to recollect them. And,

speaking generally, the '*real*' and '*personal*' of the Civilians, and the '*real*' and '*personal*' of the English Lawyers, denote two distinctions which are completely disparate.

TABLE II.
Note 5, 2,
8, 4.

3. In the sense of the Civilians, '*jus personale*' signifies *any* right which avails against a person *certain* or against persons *certain*. In the English Law '*personal*' sometimes signifies a *sort* or *species* of such rights: viz. those *rights of action*, which, in the language of the Roman Lawyers, '*nec hereditibus nec in heredes competunt*:' which neither pass to the persons who *represent* the injured parties, nor avail against the persons who *represent* the injuring parties. Being limited to parties who are directly affected by wrong, and only availing against parties who are authors of wrong, these rights of action are styled by English Lawyers '*personal*:' Or (more properly) they are said to *expire* (or to be *extinguished*) with the *persons* of the injured or injuring.

'*Actio personalis moritur cum personâ*,' is the rule or maxim applied to the rights in question. But, like a thousand phrases dignified with the name of maxims, this wretched saw is a purely identical proposition. For a *personal* action (as a term is here understood) means a right of action which expires or is extinguished with the party.

4. The *servitudes* of the Roman Law are of two kinds: 1°. *prædial* or *real* servitudes (—'*servitutes prædiorum sive rerum*') : 2°. *personal* servitudes (—'*servitutes personarum sive hominum*').

Now '*real*' and '*personal*,' as distinguishing the kinds of servitudes, must not be confounded with '*real*' and '*personal*,' as synonymous or equivalent expressions for '*in rem*,' and '*in personam*.'

In a certain sense, all servitudes are *real*. For all servitudes are rights *in rem*, and belong to that *genus* of rights *in rem* which subsist *in re aliend*. (See above, Note 3, B. b. : Note 4, A.)

And, in a certain sense, all servitudes are *personal*. For servitudes, like other rights, reside in *persons*, or are enjoyed or exercised by *persons*.

The distinction between '*real*' and '*personal*,' as applied and restricted to servitudes, is this :

A *real* servitude resides in a given person, as the owner or occupier, for the time being, of a given *prædium* : i.e. a given field, or other parcel of land ; or a given building, with the land whereon it is erected. A *personal* servitude resides in a given person, without respect to the ownership or occupation of a

TABLE II.
Notes 5, 6.

prædium. To borrow the technical language of the English Law, *real* servitudes are *appurtenant to lands or messuages*: *personal* servitudes are servitudes *in gross*, or are annexed to the *persons* of the parties in whom they reside.

Every *real* servitude (like every imaginable right) resides in a *person or persons*. But since it resides in the person as occupier of the given *prædium*, and devolves upon every person who successively occupies the same, the right is ascribed (by a natural and convenient *ellipsis*) to the *prædium* itself. Vesting in every person who happens to occupy the *prædium*, and vesting in every occupier *as* the occupier thereof, the right is spoken of as if it resided in the *prædium*, and as if it existed for the advantage of that senseless or inanimate subject. The *prædium* is erected into a legal or fictitious *person*, and is styled '*prædium dominans*.'

On the other hand, the *prædium*, against whose occupiers the right is enjoyed or exercised, is spoken of (by a like *ellipsis*) as if it were subject to a duty. The duty attaching upon the successive occupiers of the *prædium*, is ascribed to the *prædium* itself: which, like the related *prædium*, is erected into a *person*, and contradistinguished from the other by the name of '*prædium serviens*.'

Hence the use of the expressions '*real*' and '*personal*' for the purpose of distinguishing servitudes.

The rights of servitudes which are inseparable from the occupation of *prædia*, are said to reside in those given or determinate *things*, and not in the physical persons who successively occupy or enjoy them. And, by virtue of this *ellipsis* and of the fiction which grows out of it, servitudes of the kind are styled '*servitutes rerum*,' or '*servitutes reales*:' i.e. rights of servitude annexed or belonging to *things*.

The rights of servitude which are not conjoined with such occupation, cannot be spoken of as if they resided in *things*. And, since it is necessary to distinguish them from real or prædial servitudes, they are styled '*servitutes personarum*' or '*servitutes personales*:' i.e. rights of servitudes annexed or belonging to persons.

[Note 6.] 'Or, more generally, *ex Conventione*.'

(A.) *Promises* are distinguished by the Roman Lawyers into *conventions* and *pollicitations*. A convention is defined thus—*duorum vel plurium in idem placitum consensus*: Or thus—*promissio ab altero data ab altero acceptata*. A pollicitation is a promise not accepted by the promisee.

Conventions are divisible into two classes. Some might be enforced by action, *according to the more ancient law*. Others, according to that law, could not be enforced by action. Conventions of the former class are styled *contracts*: conventions of the latter class, *pacts*.

TABLE II.
Note 6, B.a.

In consequence of rules introduced by the Prætors, or in consequence of laws passed by the supreme legislature, the parties interested in certain pacts were enabled to enforce them by action. In other words, pacts of certain species passed into the class of contracts, but improperly retained the name which formerly applied to them with propriety. Pacts of other species were not affected by these changes, but continued in their primitive state.

Pacts which the interested parties are enabled to enforce by action, are distinguished by the Roman Lawyers into *prætorian* and *legitimate*: that is to say, into such as the parties can enforce by virtue of the Prætorian edict, and such as the parties can enforce by virtue of acts of legislature.

In the language of the Modern Civilians, pacts which the interested parties are unable to enforce by action, are styled *nuda*: *i.e.* not clothed with rights of action. Pacts which the interested parties are enabled to enforce by action, are styled *non nuda* or *vestita*: *i.e.* clothed with rights of action.

It follows from the preceding analysis, that the scheme of *obligations* which is given by the Compilers of the Institutes wants an important member: namely, obligations *ex pacto*. If they had been true to their own method, they would not have opposed *directly* to the obligations which arise from delicts, the obligations which arise from *contracts*. According to that method, the obligations which arise from delicts should be opposed *directly* to the obligations which arise from *conventions*. And these should be divided into two classes: viz. obligations *ex contractu* and obligations *ex pacto*.

(B.) The following brief remarks upon certain terms, may save the student much perplexity.

(a.) In the language of modern jurisprudence, '*contract*' is often synonymous with the '*convention*' of the Roman Lawyers.

In the language of the Roman Law, '*contract*' denoted originally *a convention which may be enforced by action*; but, in consequence of the changes to which I have adverted above, its import was somewhat narrowed. It ceased to denote generally *a convention which may be enforced by action*, and was restricted to conventions which the parties might enforce *by virtue of the*

TABLE II.
Note 6, B.
a. b. c., C.

more ancient law. For the pacts, which, in consequence of those changes, were clothed with the rights of action, were not styled contracts, although they were contracts in effect. Consequently, the definition, which, in earlier times applied exclusively to *contracts*, applied indifferently, at a later period, to *contracts*, and *obligatory pacts*.

In the language of the English Law, '*contract*' is a term of uncertain extension. Used loosely, it is equivalent to '*convention*' or '*agreement*.' Taken in the largest signification which can be given to it correctly, it denotes a convention or agreement which the Courts of Justice will enforce. That is to say, it bears the meaning which was attached to it originally by the Roman Juriconsults.

(b.) In the language of the Roman Law, the term '*convention*' is synonymous with the term '*agreement*,' and comprises the term '*contract*.'

In the language of the English Law, '*convention*' or '*covenant*' is restricted to *contracts*, and to contracts of a *subordinate species*: namely, to a species of that species of contracts which are evidenced by writing under seal.

In the language of the English Law, the meaning of '*bond*' is not less narrow and anomalous than that which is attached to '*covenant*.' With the Roman Jurists, and with the Modern Civilians, '*vinculum*,' or '*bond*' (agreeably to its obvious meaning) is equivalent to '*obligatio*.' With the English Lawyers, it denotes a unilateral promise evidenced by writing under seal and couched in a peculiar form. Or, perhaps, it rather denotes the writing by which the promise is evidenced than the promise or contract itself.

(c.) Although '*pact*' is usually opposed to '*contract*,' it is frequently synonymous with '*convention*.' And when it is used in this, its larger or generic meaning, it is not opposed to, but comprises '*contract*.'

In the language of the Roman Jurists, or rather of the Modern Civilians, *every* pact or convention which cannot be enforced by action is styled *nude*. In the language of the English Lawyers, the import of *nudum pactum* has been strangely narrowed. Instead of denoting *generally* agreements which cannot be enforced, it is restricted to agreements which are void *for a special or particular reason*: namely, for want of sufficient consideration.

(C.) From conventions, contracts, and pacts, I pass to obli-

gations '*quasi ex contractu*,' or (speaking more generally and adequately) to obligations '*quasi ex conventione*.'

TABLE II.
Note 6, C.
a. b.

(a.) Obligations *quasi ex contractu* (or, rather, *quasi ex conventione*) arise from facts which are not conventions, and which also are not violations of existing obligations or duties. In other words, they are not begotten by conventions, nor are they begotten by wrongs.

The facts which I am now considering are *not* wrongs, and are sources or causes of *obligation*. By this analogy, and by this analogy only, these facts are allied to contracts and to pacts which are contracts in effect. And the obligations which arise from these facts are said, by reason of this analogy, to arise '*quasi ex contractu*,' or '*quasi ex conventione*.' For, in the language of the Roman Lawyers, *analogy* is commonly denoted by the adverb *quasi*, or by the adverb *uti* and its derivative *utilis*.

I will try to illustrate, by a plain and brief example, the propositions which I have now stated in general or abstract terms.

Soluti indebiti, or the payment and receipt of money erroneously supposed to be due, is one of the facts which I am now considering.

The erroneous payment and receipt is *a source or cause of obligation*, although the transaction is not a convention, and although there is nothing in the fact savouring of injury or wrong. There is no convention, inasmuch as the *performance* of an obligation is the only design of the payment. There is no wrong, inasmuch as the party who receives the money believes that the money is due. But inasmuch as the money is not *given*, an obligation to return it attaches upon the party who receives it from the moment at which it is paid.

He is not obliged by *convention*, but '*quasi ex conventione*.' He is bound *as if* by convention, or he is bound *as it were* by convention. *As* he would have been obliged in case he had entered into a contract, *so* is he actually obliged by the fact which has actually happened.

And as the fact which begets the obligation is *as it were* a convention, so is a breach of the obligation *analogous* to a breach of contract.

(b.) The *species* of quasi-contracts have nothing in common but this: namely, that they are sources or causes of *obligation*; that they are *not* wrongs: and that they are *not* contracts or other conventions.

Accordingly, in an excerpt in the Digests from the *Res*

TABLE II.
Note 6, C.
b. c.

Quotidianæ of *Gaius*, obligations are divided in the following manner: 1st, obligations *ex contractu*: 2ndly, obligations *ex maleficio*: 3rdly, *anomalous* obligations: i.e. obligations which are not reducible to either of the preceding classes. 'Obligaciones aut ex contractu nascuntur, aut ex maleficio, aut *proprio quodam jure ex variis causarum figuris*.' Dig. lib. xlv. tit. 7, l. 1, in princip.

It appears from other excerpts, that *anomalous* obligations were divided in the *Res Quotidianæ* into two classes: namely, obligations *quasi ex contractu* and obligations *quasi ex maleficio*. But all the obligations of this last-mentioned class which I have anywhere happened to meet with, are either obligations arising from genuine delicts, or are not distinguishable from the obligations which are styled '*quasi ex contractu*.' (See Table I. note 7.) Consequently, '*anomalous* obligations' and '*obligations quasi ex contractu*' may be considered equivalent expressions. Each of them denotes this, and this only: namely, that the sources of the obligations in question are neither delicts nor conventions, and that the various *species* into which those obligations are divisible have nothing in common excepting that negative property.

For obligations *ex delicto* or *ex maleficio*, see Table I.

(c.) The consent of the parties is of the essence of a contract. But this consent may be manifested in different ways. It may be manifested by *words* written or spoken; or by signs which are *not* words. When it is manifested by words, the contract is styled *express*. When it is manifested by conduct, or by signs which are *not* words, the contract is styled *implied*, or, more properly, *tacit*. In either case, there is a genuine or proper *convention*.

But in the language of English Jurisprudence, *quasi-contracts* (i.e. sources of obligation which are neither conventions nor wrongs) are styled '*implied contracts*,' or '*contracts which the law implies*.' That is to say, *quasi-contracts*, and genuine though implied contracts, are denoted by one name, or by names which are nearly alike. It is scarcely necessary to add, that *quasi-contracts*, and implied or tacit contracts, are commonly or frequently confounded by English Lawyers. (See, in particular, Sir William Blackstone's Commentaries, B. ii. ch. 30, and B. iii. ch. 9.)

~~.....~~ ~~Questions~~ ~~.....~~ ~~and~~ ~~limitations~~ are divided in the following

NOTES TO TABLE IX.

[**Note 1.**] See '*Traité de Législation civile et pénale, etc.*, par M. Bentham, publiés en François par M. Dumont.' And see, particularly, the '*Vue générale d'un Corps complet de Droit*,' which occupies the First Volume of the '*Traité, etc.*' from page 141 to the end. N.B. The edition here referred to, is the first (À Paris, An X=1802).

TABLE IX.
Notes 1-6.

[**Note 2.**] For the distinction between National and International Law, see Vol. I. pp. 146, 147, 168, 328 to 331. For International Law in particular, see pp. 328 to 331.

[**Note 3.**] For the distinction between *Droit politique* and *Droit civil* (as opposed to *politique*), and for *Droit politique* in particular, see Vol. I. pp. 147, 148, 200, 308 to 327, 333, 335 et seq., 339 et seq., 346.

[**Note 4.**] For the distinction between *Code général* and *Codes particuliers*, see Vol. I. pp. 150, 151, 299, 305, 333, 334, 364: Vol. III. p. 278. It may be inferred from those places, as well as from Vol. I. pp. 294 to 297 (*Des États domestiques et civils*), and from Vol. II. pp. 175 to 236 (*Des États privés*), that the distinction, intended by Mr. Bentham, tallies nearly with the long-established distinction between *Jus Rerum* and *Jus Personarum*. See Tables I., II., IV., Section 1, VII., VIII., X.

[**Note 5.**] For the distinction between *Substantive* and *Adjective Law* (or *Law simpliciter*, and *Procedure*) see Vol. I. pp. 149, 150, 166. For *Procedure* in particular, see pp. 349 to 351.

[**Note 6.**] For the distinction between *Civil Law* and *Penal Law*, see Vol. I. pp. 155 et seq., 159 et seq., 170; and compare with those places the second paragraph of p. 298. For the Civil Code in particular, see pp. 225 to 307, and Vol. II. pp. 110 to 174. For the Penal Code in particular, see Vol. I. pp. 170 to 224; Vol. II. p. 237 to the end; Vol. III. p. 1 to 191.

TABLE

Exhibiting the *Corpus Juris* ('Corps complet de Droit') arranged

NATIONAL, MUNICIPAL, or INTERNAL LAW [i.e. *JUS CIVILE*, in one of its numerous senses]: [Note

Containing—

DROIT POLITIQUE [i.e. *JUS PUBLICUM*]:

Containing—

Droit constitutionnel :

Relating to

1. The Powers of the Sovereign, in the large and correct signification :—'*Summus Imperans in Republica*, sive *Is Monarcha sit, sive Optimates, sive Populus*.' Or, in other words, the Powers of the One, the Few, or the Many, in whom the Sovereignty—the supreme, unlimited, and, legally, irresponsible Command—resides.

2. The *Distribution* of the Sovereign powers, where they are not united in a single person.

3. The *Duties* of the Government (subjects or citizens) towards the Sovereign.

A large portion of Constitutional Law is, strictly, a branch of *Morals*. See '*Tratés, etc.*' vol. i. pp. 167, 326.

DROIT CIVIL (as opposed to *Droit pénal*) [i.e. Law regarding *primary* Rights and Obligations]:

Relating to—

Rights IN REM, with their corresponding Duties:

Rights IN PERSONAM, or OBLIGATIONS *stricto sensu* :

[Note 7.]

In which Department of rights and obligations are comprised the following genera: viz.—

Obligations arising from *Pacte ou Convention* (i.e. *ex CONTRACTU*):

Obligations arising from *Besoin supérieur, Service antérieur, Responsabilité pour une personne tierce, etc.* (i.e. *QUASI ex Contractu*). [Note 8.]

IX.

in the Order which seems to have been conceived by *Mr. Bentham*.

1.]

INTERNATIONAL, or EXTERNAL LAW [i.e. *JUS Integrarum GEN-
TIUM*]: [Note 2.]

Relating to the Rights and Obligations of *Independent Political
Societies towards one another*.

Thus considered, it is, strictly, a branch of *Morals*. See '*Traité*s,
etc.' vol. i. pp. 168, 328. But, as enforced in any given Society
by the Sovereign, or Supreme Power, it properly constitutes a
portion of (national or internal) *Law*.

DROIT CIVIL (as opposed to *Droit politique*) [i.e. *JUS PRIVATUM*]:
[Note 3]

Containing—

Law regarding

The Rights and Obligations of Per-
sons who are clothed with Political
Powers in subordination to the Sove-
reign.

See '*Traité*s, *etc.*' vol. i. pp. 335,
339, 346, *etc.*:—*Organisation judi-
ciaire, Code militaire, Code de Finance,
Code ecclésiastique, etc.*

CODE GÉNÉRAL, ou LOIS GÉNÉRALES
[i.e. *JUS RERUM*]:

Containing—

CODES PARTICULIERS, ou *Recueils de
LOIS PARTICULIÈRES* [i.e. *JUS
PERSONARUM*]. [Note 4.]

DROIT SUBSTANTIF [or *The Law*]:

Containing—

DROIT ADJECTIF [or *Law of
Procedure*]: [Note 5.]

Containing—

Law of *Civil Procedure*:

Law of *Criminal
Procedure*.

DROIT PÉNAL [i.e. *Law regarding Injuries*; with the Rights and
Obligations (*secondary or sanctioning*) which arise from in-
juries]: [Note 6.]

Relating to—

Civil Injuries; with the *Rights*
which thence accrue to the injured
parties or their representatives,
and the correlating or correspond-
ing *Obligations* which attach upon
the opposite parties.

Crimes and Punishments; together
with the *Satisfaction* to the injured
parties or their representatives, which
(in the opinion of *Mr. Bentham*) it
would be expedient to exact from the
criminals. [Note 9.]

[For the *Notes* to this Table, see pp. 985, 988.]

TABLE IX.
Notes 7-9.

[Note 7.] The important division of Rights into *Jura in Rem* and *Jura in Personam* (*determinatam*), is neither formally stated, nor consistently pursued, in the '*Vue générale*.' It may, however, be traced from p. 247 to p. 293; and see particularly pp. 271, 272, 290, 291, 292, 293. In the Second Volume it appears with more distinctness. See (pp. 110 to 155) '*Modes of Acquiring Property*': i.e. *Servitudes*, with other Rights in *re aliena*, as well as Dominion or Property strictly so called: And see also (pp. 156 to 168) '*Modes of acquiring Rights to Services*': i.e. Acts to be done or forborne by assignable or determinate persons, in consequence of obligations (as understood by the Roman Lawyers). At p. 167, the term '*Obligation*' is employed in this its original meaning.

[Note 8.] For Obligations *ex contractu* and *quasi ex-contractu*, see Vol. I. pp. 271, 272, 286 et seq.; Vol. II. pp. 156 to 168, 362 et seq.

[Note 9.] The Law of Civil Injuries (with the corresponding Remedies) and the Law of Crimes (with the corresponding Punishments and Remedies), are not divided into two independent parcels, but are classed or blended together under the name of '*Droit pénal*.' See Vol. I. pp. 155 et seq., 159 et seq., 170 to 224; Vol. II. p. 237 to the end of the Volume; Vol. III. p. 1 to 191. Compulsory Restitution and Satisfaction relate, for the most part, to Civil Injuries; Penal Remedies, to Crimes. See Vol. II. pp. 308 to 379; and p. 380 to the end of the Volume.

ESSAYS ON INTERPRETATION AND ANALOGY.

THE following Essays or Notes are referred to in the thirty-third Lecture (p. 577, *ante*), in which the same subjects are more succinctly handled. They were not found with the Lectures, but were doubtless intended by the Author to be incorporated in the great work which he meditated.

In a note in the page above-mentioned, I spoke of the 'Essay or Interpretation' as complete. This, unfortunately, is a mistake; nor have I been able to find any trace of the conclusion.

The original of the 'Excursus on Analogy' consists, in great part, of unarranged and almost illegible fragments, amongst which it was extremely difficult to establish anything like order and coherence. I hesitated for some time whether to submit what the Author left in so imperfect a state to the public eye. Nor should I have ventured to do so, had I not been encouraged by the opinion of several persons of high authority in such a matter, to whom it has been submitted. They have exhorted me by no means to suppress this essay; 'Since,' to use the words of one of those most qualified to decide, 'though, from the fragmentary form in which it must necessarily appear, its excellences will probably be hidden from most readers, its great philosophical value will be apparent to those who study it with attention.'

S. A.

NOTE ON INTERPRETATION.

(PROPER AND IMPROPER).

IN my thirty-third Lecture I have tried to contrast Interpretation (in the proper acceptation of the term) and the induction of a rule of law from a judicial decision. In (the earlier portion of) the present note, I shall try to distinguish Interpretation (in the proper acceptation of the term) from the various modes of judicial legislation to which the name of interpretation is not unfrequently misapplied.

The discovery of the law which the lawgiver intended to establish, is the object of genuine interpretation: or (changing the phrase), its object is the discovery of the intention with which he constructed the statute, or of the sense which he attached to the words wherein the statute is expressed. For the reasons which I have given in the text, the literal meaning of

the words wherein the statute is expressed, is the primary index or clue to the intention or sense of its author.

Now the literal meaning of words (or the grammatical meaning of words) is the meaning which custom has annexed to them. It is the meaning attached to them commonly by all or most of the persons who use habitually the given language: Or, if the words be technical, it is the meaning attached to them commonly by all or most of the persons who are specially conversant or occupied with the given art (or science). Generally, the customary meaning of the words wherein the statute is expressed, is obvious or easily assignable; and generally, therefore, the interpreter assumes it tacitly, and without hesitation and inquiry. But, occasionally, the customary meaning of the words is indeterminate and dubious. What is the meaning which custom has annexed to the words, is, therefore, an inquiry which the interpreter may be called upon to institute. Consequently, the interpretation of a statute by the literal meaning of the words may possibly consist of a twofold process: namely, an inquiry after the meaning which custom has annexed to the words, and a use of that literal meaning as a clue to the sense of the legislature. The interpreter seeking the meaning annexed to the words by custom, may not be able to determine it; or he may not be able to find in it, when he has determined or assumed it, any determinate sense that the legislature may have attached to them: And, on either of these suppositions, he may seek in other *indicia*, the intention which the legislature held. Or, when he has determined or assumed the customary meaning of the words, the interpreter may be able to discover in their customary or literal meaning, a determinate or definite intention that the legislature may have entertained: And, on this supposition, he ought to presume strongly that the possible intention which he finds is the very intention or purpose with which the statute was made.

The intention, however, of the legislature, as shewn by that literal meaning, may differ from the intention of the legislature, as shewn by other *indicia*; and the presumption in favour of the intention which that literal meaning suggests, may be fainter than the evidence for the intention which other *indicia* point at. On which supposition, the last of these possible intentions ought to be taken by the interpreter, as and for the intention which the legislature actually held. For the literal meaning of the words, though it offers a strong presumption, is not conclusive of the purpose with which the statute was made.

It appears, then, from what has foregone, that the subjects of the science of interpretation are principally the following; namely, the natures of the various indices to the customary meaning of the words in which the statute is expressed; the natures of the various indices, other than that literal meaning, to the intention or sense of the lawgiver; the cases wherein the intention which that literal meaning may suggest, should bend and yield to the intention which other *indicia* may point at.

Having stated the object or purpose of genuine interpretation, and pointed at the subjects of the science which is conversant about it, we will touch upon the interpretation, *ex ratione legis*, through which an unequivocal statute is extended or restricted.

It may happen that the author of a statute, when he is making the statute, conceives and expresses exactly the intention with which he is making it, but conceives imperfectly and confusedly the end which determines him to make it. Now, since he conceives its scope inadequately and indistinctly, he scarcely pursues its scope with logical completeness, or he scarcely adheres to its scope with logical consistency. Consequently, though he conceives and expresses exactly the intention with which he is making it, the statute, in respect of its reason, is defective or excessive. Some class of cases which the reason of the statute embraces is not embraced by the statute itself; or the statute itself embraces some class of cases which a logical adherence to its reason would determine its author to exclude from it.

But, in pursuance of a power which often is exercised by judges (and, where they are subordinate to the State, with its express or tacit authority), the judge who finds that a statute is thus defective or excessive, usually fills the chasm, or cuts away the excrescence. In order to the accomplishment of the end for which the statute was established, the judge completes or corrects the faulty or exorbitant intention with which it actually was made. He enlarges the defective, or reduces the excessive statute, and adjusts it to the reach of its ground. For he applies it to a case of a class which it surely does not embrace, but to which its reason or scope should have made the lawgiver extend it; or he withholds it from a case of a class which it embraces indisputably, but which its reason or scope should have made the lawgiver exclude from it.

Now, according to a notion or phrase which is current with writers on law, the judge who thus enlarges, or thus reduces the statute, 'interprets the statute by its reason:' or his extension

or restriction of the defective or excessive statute is 'extensive or restrictive interpretation *ex ratione legis*.' His adjustment, however, of the statute to the reach or extent of its ground, is a palpable act of judicial legislation, and is not interpretation or construction (in the proper acceptation of the term). The discovery of the intention with which the statute was made, is the object of genuine interpretation; and, of the various clues to the actual intention of the lawgiver, the reason of the statute is one.

But where a statute is extended or restricted in the manner which we now are considering, the actual intention of the lawgiver is not doubted by the judge. Instead of unaffectedly seeking the actual intention of the lawgiver, and using the reason of the statute as one of the various clues to it, the judge rejects an actual (though faulty or exorbitant) intention which the lawgiver palpably held. Instead of interpreting a statute obscurely and dubiously worded, the judge modifies a statute clearly and precisely expressed: putting in the place of the law which the lawgiver indisputably made, the law which the reason of the statute should have determined the lawgiver to make. Consequently, where the judge in show interprets the statute restrictively, he abrogates or annuls it partially. And where the judge in show interprets the statute extensively, he makes of its reason a judiciary rule by which its defect is supplied. He makes of the reason of the statute a general ground of decision which provides for the class of cases overlooked and omitted by the lawgiver: For, as a *ratio decidendi*, though not as a *ratio legis*, the reason of a statute may perform the functions of a law.

In the following passages from the Pandects (Lib. I. tit. 3, ll. 10, 11, 12, 13), the rationale of the process of extension, which the judge performs upon the statute, is stated unaffectedly and frankly. 'Neque leges, neque senatusconsulta ita scribi possunt, ut omnes casus, qui quandoque inciderint, comprehendantur; et ideo de his, quæ primo constituuntur, interpretatione (aut constitutione principis) certius statuendum est.' 'Non possunt omnes articuli singillatim aut legibus aut senatusconsultis comprehendi; sed cum in aliquâ causâ sententia (sive ratio) eorum manifesta est, is, qui jurisdictioni præest, ad similia procedere, atque ita jus dicere debet.' 'Quotiens lege aliquid unum vel alterum introductum est, bona occasio est, cetera, quæ tendunt ad eandem utilitatem, interpretatione, vel certe jurisdictione suppleri.'

There is, it is true, an extensive, or restrictive interpretation

which is properly interpretation or construction. For the literal meaning of the words wherein the statute is expressed, may not correspond to the purpose wherewith it was actually made; and the interpreter of the statute, guided by another index to the actual purpose of the statute, may abandon the meaning which custom has annexed to the words, for the meaning which the lawgiver attached to them.

Now, if the meaning annexed to the words by custom be narrower than the meaning attached to the words by the lawgiver, the interpreter (it is commonly said) interprets the statute extensively: If the former of the meanings be broader than the latter, the interpreter (it is commonly said) interprets the statute restrictively. But, manifestly, the statute itself is not extended or restricted by the process which we now are considering. The very law which actually was made by the lawgiver, is also the very law which is sought and stuck to by the interpreter; who merely proportions the grammatical meaning of the words to the broader or narrower meaning with which the lawgiver used them. The interpreter extends or restricts, not the statute itself, but the literal meaning of the words wherein the statute is expressed.

Having tried to distinguish genuine interpretation from the modes of judicial legislation which often are styled interpretation, we proffer a few remarks on some of the leading terms which are connected with the distinction in question.

Although the intention with which a statute is made often differs from the end which moves the lawgiver to make it, the reason of a statute and the actual intention of the lawgiver oftener coincide or tally. Accordingly, they often are opposed together, or contradistinguished jointly, to the literal meaning of the words in which the statute is expressed. Now, as contradistinguished jointly to the literal meaning of the words, the reason of a statute with the actual intention of the lawgiver are commonly styled by the moderns 'the spirit of the law:' by the Roman jurists, and the moderns who adopt their language, 'the *sentence* of the law.'

According to most of the writers who have treated of interpretation, it is either *grammatical* or *logical*. The interpretation of a statute bears the name of *grammatical* in so far as it seeks the meaning which custom has annexed to the words, or seeks in that meaning exclusively the actual intention of the lawgiver. As looking for other indices to the actual intention of the lawgiver, or as seeking his actual intention through such other

indicia, the interpretation of a statute assumes the name of *logical*. But as every process of interpretation involves a logical process, the contradistinguished epithets scarcely suggest the distinction which they are employed to express. The extension or restriction, *ex ratione legis*, of a statute unequivocally worded, is not interpretation or construction (in the proper acceptation of the term). According, however, to most of the writers who have treated of interpretation, this process of extension or restriction belongs to the kind of interpretation which they mark with the name of logical.

Of the numerous equivocal terms which the language of jurisprudence comprises, *equity* perhaps is the most equivocal and perplexing.¹⁵ Now, of the many and disparate meanings given to this slippery expression, some are connected inseparably with a kind of spurious interpretation: namely, with the so-called extensive interpretation, *ex ratione legis*, of a statute unequivocally worded. Where a defective statute is thus adjusted to its reason, there lies an *equality* or *æquity* (or a parity, analogy, or likeness) between the cases which the statute includes and the cases to which it is extended. A case to which it is extended, as well as a case which it includes, is embraced by its reason; and the two cases, therefore, in their common relation to its reason, are *equal*, *analogous*, or *like*.

Accordingly, *equity* or *æquity* signifies the objects following (besides a multitude of others):—1. The parity between a case to which the statute is extended and a case which the statute includes.—2. The spurious extensive interpretation *ex ratione legis*: that is to say, the extension of the statute agreeably to the parity of the cases, or the process of extending the statute agreeably to the parity of the cases.—3. A personified abstract name which is moved by the parity of the cases to call for the extension of the statute. ('Quod in re pari valet (says Cicero) valeat in hac quæ par est: valeat *æquitas*, quæ paribus in causis paria jura desiderat.')

—4. The reason of the statute to which the extension is given, or the reason of any statute which needs a similiar extension. (It often is said, for example, of such or such a case, that the case is within the *equity* of such or such a statute, though the case is not included by the statute itself.)

The spurious extensive interpretation *ex ratione legis*, is

¹⁵ See Lecture XXXIII. *ante*.

styled *analogy* as well as *equity*. And it is said of *analogy*, as it is said of *equity*, that she is moved by the parity of the cases to call for the extension of the statute. It is said moreover of the pretended interpreter, that he interprets the statute *analogically*. But it would seem that the term *analogy*, like the expression *equity*, signifies most properly the parity between the cases.

['Equity' is not applicable to restrictive interpretation *ex ratione legis*.]

The extensive or restrictive interpretation *ex ratione legis*, of a statute unequivocally worded, are not the only modes of judicial or oblique legislation to which the name of interpretation is often misapplied. *E.g.*: Entire or partial abrogation of a statute (with or without substitution of a new rule), without regard even to the reason of the statute. The grounds for which are, the judge's own views of utility, or of that consequence and analogy (in legislation) to which we shall advert hereafter.

(He is to be blamed commonly, not for innovation, but for working it under false pretences, and without system.)

So, also, the creation of judiciary law (independently of the application of any statute) has been styled interpretation. *E.g.*: The law devised by *prudentes*, and adopted by tribunals, was said to be devised by *interpreting* the old law: such interpretation consisting, partly, in forming new rules, by consequence and analogy, on anterior law (statute or judiciary) and hence, probably, the name of interpretation; and, partly, in forming new rules, without regard to consequence or analogy, according to general utility, or any other standard of ethics (or legislation).¹⁶

As I shall shew hereafter, authentic interpretation is also genuine or spurious. A declaratory law being truly such, or introducing the new law under the guise of interpreting the purpose with which the old was made.¹⁷

From the two processes¹⁸ which I have endeavoured to contrast, I pass to the celebrated phrase which is closely connected

¹⁶ 'Interpretis officium, quod proprie in legis *sententia explicanda* versatur, per se quidem facile discernitur ab eorum munere, quorum est, ad causas applicare leges; unde etiam recte de utroque genere seorsim multa præcipiuntur. Est tamen genus quoddam præceptorum velut promiscuum atque in medio positum,

eorum scilicet, quæ ad leges ex earum *ratione*, aut ad *similia producendas* aut *restringendas* spectant.'—Mühlenbruch, *Doct. Pand.* vol. i. lib. i. cap. 3.

¹⁷ Interpretation by *règlement*. See French Code and Bentham's *Judicial Establishments*.

¹⁸ See p. 632, *ante*.

with them ; though it regards the application of law (and also the creation of law) rather than the discovery of law by interpretation or induction. 'After all the certainty (says Paley) that can be given to points of law, either by the interposition of the legislature, or the authority of precedents, one principal source of disputation, and into which, indeed, the greater part of legal controversies may be resolved, will remain still : namely, *'the competition of opposite analogies.'* The nature of the difficulties denoted by this celebrated phrase he attempts to state in the following passage. 'When a point of law has once been adjudged, neither that question, nor any which completely, and in all its circumstances, corresponds with *that*, can be brought a second time into dispute. But questions arise which resemble *that* only indirectly, and in part, and in certain views and circumstances, and which seem to bear an equal or greater affinity to other adjudged cases : questions which can be brought within any fixed rule only by analogy, and which hold an analogy by relation to different rules. It is by the urging of the different analogies that the contention of the Bar is carried on : And it is in the comparison, adjustment, and reconciliation of them with one another ; and in the discerning of such distinctions, and the framing of such a determination, as may save the various rules alleged in the cause, or, if that be impossible, as may give up the weaker analogy to the stronger, that the sagacity and wisdom of the Court are seen and exercised.' Now, like all or most of the phrases into which 'analogy' enters, the celebrated phrase 'the competition of opposite analogies' is often used indeterminately. Accordingly, it has darkened the nature of the difficulties which it was contrived to express ; and, therewith, it has obscured that pregnant distinction between statute and judiciary law with which we are presently occupied. It needs, therefore, the exact examination which I now shall bestow upon it.

Two distinct difficulties, incident respectively to two distinct processes, are denoted by the phrase as it is usually applied. Of these distinct difficulties, one is incident to the application of statute or judiciary law already obtaining or existing : the other is incident to the decision of a specific or particular case for which the existing law affords no applicable rule. The former may perplex the judge in his purely judicial character, or as properly exercising his properly judicial functions : the latter may embarrass the judge in his quality of judicial legislator, or as virtually making a rule for cases of a new description. As it is usually applied, the phrase is confined to the difficulty

which is incident to the application of law, with the difficulty which is incident to judicial legislation. But a difficulty resembling these is incident to direct legislation, or the process of creating a statute. And this difficulty may be styled, as properly as the two others, a competition of opposite analogies.

I first shall consider the difficulty which is incident to the application of law already obtaining or existing; though the difficulty which is incident to judicial legislation is probably the difficulty that Paley particularly contemplated. Having considered the difficulty which is incident to the application of law, I shall proceed to consider the difficulty which is incident to judicial legislation, and also the resembling difficulty which is incident to the creation of a statute.

The system of positive law obtaining in any nation (or the complexion or collective whole of its positive law) is a body or aggregate (methodised or unmethodised) of various but connected rules. Now every rule which is definite or precise is applicable to cases of a class (or governs cases of a class) which also is definite or precise. For the rule is shaped exactly to the essence or nature of the class, or to the essentials, positive and negative, possessed by a case of the class: meaning by the positive and negative essentials of the case the properties which it necessarily has, and the properties which it necessarily wants, in so far as it belongs to the class, and in so far as the rule will apply to it. And as the rule is shaped exactly to the essence or nature of the class, so is the essence of the class exactly marked by the rule: the determinate purpose of the rule, and the determinate import of the rule, fixing the class of cases which its author intended it to govern. Consequently, if every rule in a system of law were perfectly definite or precise, every specific case that the whole of the system embraced would belong to a kind or sort perfectly definite or precise.

On the appearance of any case that the whole of the system embraced, the class to which it belonged, and the rule by which it was governed, might be known and assigned with certainty; or (at the least) the class and the rule might be known and assigned with certainty, by every discerning lawyer who had mastered the system thoroughly. But the ideal completeness and correctness which I now have imagined is not attainable in fact. More or fewer of the rules which constitute a system of law, and more or fewer of the cases which the whole of the system extends to, are inevitably framed and classed more or less indefinitely. What exactly are the cases which a given

rule applies to, or what exactly is the rule which governs a given case, is a doubt that would arise occasionally, and would not be soluble always, though the system had been built and ordered with matchless solicitude and skill. And hence arises, or hence arises mainly, the difficulty which I now am considering: a difficulty incident to the application of law, and not to the creation of law by judicial or direct legislation.

In order to an analysis of the difficulty which I now am considering, we will suppose that the rule A is not perfectly definite; or (what is the same thing expressed in a different form) that the essence of the class of cases which A was intended to govern is not marked by A with perfect exactness. Further, we will suppose that the rule B, with the essence of the class of cases which B was intended to govern, is in the same plight of uncertainty. Moreover, we will suppose that the case x demands judicial decision: that x in certain respects bears a likeness to the cases which seem to be governed by A; but that x in other respects bears a likeness to the cases which seem to be governed by B. Lastly, I will suppose that the judge, distracted by the two likenesses, doubts whether A or B be the rule applicable to x .

Now, the difficulty which stays the judge from applying the law to the fact, may be called (in metaphorical language) 'a competition of opposite analogies.' For the likeness of x to the cases which seemingly are governed by A, and the likeness of x to the cases which seemingly are governed by B, may be deemed two opposite suitors contending for the preference of the judge: the former entreating the judge to decide x by A, and the latter imploring the judge to resolve x by B.

The difficulty arises, however, from the indefiniteness of the two rules. For if the rule A be the rule applicable to x (or if the rule B be the rule applicable to x), x , in respect of A (or x , in respect of B), is in the following double predicament. It has *all* the positive essentials possessed by cases of the class which the rule was intended to govern: And, moreover, it has *no* property or character through which it differs from those cases essentially or materially: that is to say, through which it differs from those cases in such wise and degree as render a common rule inapplicable to it and them.

Consequently, if the rules A and B be perfectly definite, and the classes of cases which they govern be therefore perfectly definite, the judge can arrive with certainty at one of the following conclusions: namely, that x is in that predicament in respect of the rule A, and therefore must be solved by A; or that x is

in that predicament in respect of the rule B, and therefore must be solved by B; or that x is *not* in that predicament in respect of either of those rules, and therefore must be solved by a third, if a third that applies may be found. The difficulty arises, therefore, from the indefiniteness of the two rules; and is rather a competition or conflict of those indefinite rules than of the opposite analogies of x to the cases of the indefinite classes.

To the foregoing analysis of the difficulty which I now am considering, I append the following explanations:—To render my supposed example as simple as possible, I have imagined that the indefinite rules which strive for the preference of the judge are only two. But, though a greater number of such rules strive for the preference of the judge, the hindrance to the application of the law is substantially the one which I have analysed. The greater, however, is the number of the indefinite and conflicting rules, the greater, of course, is his difficulty. The greater, of course, is his difficulty in subsuming the case before him under the appropriate rule; or in finding that the case before him is embraced by none of the rules of which the law that he administers is actually composed.

Although it arises more frequently from a conflict of indefinite rules, the difficulty which I now am considering (or a difficulty essentially like it) may arise, without such a conflict, from a single indefinite rule. For it probably has happened, where a rule or principle is indefinite, that some judges have applied it to certain specific cases, whilst others have withheld it from cases essentially similar to the former. In other words, the rule has been applied to some, and withheld from other cases, though all the adjudged cases are of one description or category. Now if x , a case in controversy, be of that description or category, it bears a likeness to the cases to which the rule has been applied, and also a likeness to the cases from which the rule has been withheld. And though the likenesses are identical in relation to the various cases, they yet are opposed and contending in relation to the indefinite rule: one of them inviting the judge to apply the rule to x , and the other suggesting to the judge that the rule is inapplicable to it.

But the difficulty which stays the judge springs from the indefiniteness of the rule. Supposing that the rule is judiciary, the difficulty implies that the existence of the rule is questionable; or, at least, has been disputed by the judges who have refused to apply it. For the rule itself is made by decisions (if it exist at all). Supposing that the rule is perfectly definite, the

judge may determine certainly (if not easily and quickly) how he should dispose of the case which awaits his judicial solution. It surely is, or it surely is not, of the class which the rule was intended to govern.

We have assumed tacitly, up to the present point, that the competition of opposite analogies which is incident to the application of law arises exclusively from the indefiniteness of a rule or rules. But it may possibly arise from a somewhat different cause: namely, the inconsistency *inter se* of several definite rules, or the intrinsic or self-inconsistency of one definite rule. Or (what, in effect, is exactly the same thing) it may possibly spring from the inconsistency with which such rules or rule have been administered or applied. Of two cases, for example, which belong to one category, and which therefore should have been adjudged by one and the same rule, the one may have been decided by a definite or precise rule and the other by a definite rule essentially different from the former. Or, supposing a single rule which is perfectly definite or precise, it may have been applied to one and withheld from another case, though the two adjudged cases are of one description or class.

Now, on either of these suppositions, it may happen that a case in controversy is essentially similar to the cases which have been resolved inconsistently. But, assuming that a case in controversy is essentially similar to those cases, it bears a likeness to one of them, and the same likeness to the other; which respective likenesses, though identical in relation to the cases, are opposed and contending analogies in relation to the rules or rule.¹⁹ Consequently the difficulty may spring from the inconsistency of several definite rules, or from the intrinsic inconsistency of a single definite rule. But, though it may spring from inconsistency which is not an effect of indefiniteness, it commonly springs from inconsistency of which indefiniteness is the cause: that is to say, it commonly springs from the inconsistency of several indefinite rules, or from the intrinsic inconsistency of a single indefinite rule. For the inconsistency in rules which is not an effect of their indefiniteness, is generally an evil that is easily corrigible.

Generally, therefore, a system or body of law is kept passably free from it by direct or judicial legislation. But the inconsistency in rules which is caused by their want of precision,

¹⁹ If two cases essentially different case in controversy be essentially similar have been decided by a common rule, a to either, it is essentially different from a competition of opposite analogies cannot the other, and not essentially like it. arise from the inconsistency. For if a

is often an invincible malady, or a malady difficult to heal.²⁰ It often inheres in the purpose of a rule, and therefore is simply incurable. And where it is susceptible of cure (which far more often is the fact), it can seldom be expelled from the system without a solicitude and skill which lawgivers, direct or judicial, have rarely felt and attained to.

It appears, then, from the foregoing analysis, that the competition of opposite analogies which is incident to the application of law, arises from this: that a rule in the system of law which the judge is engaged in administering, is inconsistent with itself; or that two or more of the rules which actually compose the system, are inconsistent with one another. It appears, also, from the same analysis, that the rule or rules are commonly thus inconsistent, because, inevitably or otherwise, it or they are indefinite; but that the rule or rules are occasionally thus inconsistent, although it or they are perfectly precise.

From the competition of opposite analogies which is incident to the application of law, I turn to the similar difficulty which is incident to judicial legislation.

(The rest wanting.)

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EXCURSUS ON ANALOGY.

ANALOGICAL REASONING AND SYLLOGISM.

HAVING analysed the equivocal phrase of which we have treated in the text,²¹ we will here review the meanings (or rather the principal meanings) of the equivocal term which it involves: namely, the term Analogy.

1. As taken with the largest, and perhaps the most current of its meanings, the term analogy is coextensive with the term likeness: In other words, it signifies likeness or resemblance of any nature or degree. The process, for example, of reasoning, which we shall scrutinise hereafter, may be grounded on a likeness or resemblance of any nature or degree; and whatever be

²⁰ Rules involving degrees: e.g. libel, lunacy, prodigality, reasonable time, reasonable notice. These are hotbeds of competing analogies. The indefiniteness is incorrigible. A discretion is left to the judge. Questions arising on them (and all competitions of analogies) are questions of law: e.g. they regard the

applicability of an uncertain or inconsistent rule or rules to a given and known fact. They are hardly questions of interpretation or induction, for though the rule were explored and known as far as possible, doubt would remain.

²¹ See Lecture XXXVII. *ante*.

the nature or degree of the given likeness or resemblance, the reasoning which is grounded upon it is styled reasoning by analogy. Moreover, the term analogy, as borrowed by the Romans from the Greeks, often signifies a reasoning which is grounded on a likeness or resemblance, instead of the likeness or resemblance whereon the reasoning is grounded. And analogy, as meaning such reasoning (or the consequent yielded by such reasoning) receives from the Roman Varro (treating of its etymon and value), the following extensive definition: 'Veritas et ratio quæ a *similitudine* oritur.'

2. Between the *species* or sorts which are parts of a *genus* or kind, there obtains a resemblance or likeness whereon the *genus* is built; or (changing the phrase) between individuals of any, and individuals of any other of those sorts, there obtains a resemblance or likeness by which they are determined to the kind. Moreover, between individuals or singulars as parts of any one of those *species*, there obtains another resemblance, which is the ground or basis of the sort. For example: Between the various *species* which are parts of the *genus* animal (or between individuals of any, and individuals of any other of those *species*) there obtains a resemblance or likeness which determines them to the *genus* animal. And between individual men, as belonging to a sort of animals, there obtains another resemblance which determines them to the *species* man.

The resemblance between the *species* which are parts of a *genus* or kind (or between individuals of any, and individuals of any other of those *species*) is styled, in the language of logicians, *generic*. The resemblance between individuals as parts of any one of those *species* is styled, in the language of logicians, *specific*.

Now the likeness between any of the sorts which are parts or members of a kind (or between individuals of any, and individuals of any other of those sorts) is commonly contradistinguished, under the name of *analogy*, to the likeness between individuals as parts of any one of those sorts. For example: The likeness of a man to any of the lower animals, as distinguished from the likeness of a man to any of the human species, is commonly called analogy. Again: The term intellect, when it is used emphatically, denotes the human intellect. But between the intellect of men and the intellect of the lower animals there obtains a generic resemblance. Accordingly, the intellect of the lower animals is styled an '*analogon* intellectûs:' that is to say, a something which re-

sembles generically the intellect of the human species, or the peculiar and pre-eminent intellect which is called intellect emphatically. Again: In relation to the several titles from which they respectively arise, an obligation *ex contractu* and an obligation *quasi ex contractu* are obligations of different species. But these two different species are parts of a common *genus*: namely, the *genus of obligationes* (in the sense of the Roman lawyers). Accordingly, an obligation *quasi ex contractu* (as the adverb *quasi* imports) is an *analogon* of an obligation annexed by the law to a contract.

It follows from what has preceded, that when we denote by the term *analogy* a generic and remoter resemblance between individuals or singulars, we make the following suppositions concerning the compared objects: First: That one or some of those objects are parcel of a given class, which, for the purpose in hand, we deem a *species*: that is to say, a class consisting exclusively of mere individuals or singulars, and not containing or comprising lower or narrower classes. Secondly: That the other or rest of those objects are not of that given species. Thirdly: That all the compared objects are parcel of a given *genus* by which that species is embraced.

3. Two or more objects may bear to another object (or they may bear respectively to several other objects), similar though several relations. Thus, *A* may be related to *x*, as *B* is related to *x*; or *A* may be related to *c* (or to *c*, *d*, and *e*), as *B* is related to *x* (or to *x*, *y*, and *z*). Now where several objects are thus related similarly, they bear to one another a likeness lying in a likeness of their relations. And this resemblance of objects lying in a resemblance of their relations, has been named by Greek and Latin, and also by modern writers, *analogy*: by Latin writers, translating from Greek, *proportio*.

Where objects are allied by a likeness lying in a likeness of their relations, the objects may be connected, or the objects may not be connected by a likeness of a different nature. On either, however, of these suppositions, the objects are parts of an actual, or a possible *genus* or *species*, built on the likeness of their relations. For a likeness of objects which lies in a likeness of their relations, as well as any other likeness connecting the objects with one another, may form a reason or ground for putting them together in a class.

Of the analogy or likeness of objects which lies in a likeness of their relations, the following examples are specimens.—The fin of a fish and the wing of a bird are *analogous* objects:

the fin being to the fish, in respect of its movements through the water, as the wing is to the bird, in respect of its movements through the air. There also obtains an *analogy* between an egg and a seed: for the egg is related to the mother, and to the incipient bird, as the seed is related to the generating, and to the inchoate plant. Where several legal cases are included by a law or principle, their similar though several relations to the law or principle which includes them, make them *analogous* cases. Thus, the several specific cases actually comprised by a statute; or the several specific cases comprised by a judiciary rule, carry a mutual *analogy*, or a mutual parity or æquity, in respect of their like relations to the statute or rule of law.

Again: We may suppose that the author of a statute, when he is making the statute, omits some class of cases falling within its reason. Now, on this supposition, a case which is thus omitted and a case which the statute includes bear to the reason of the statute similar though several relations. And in respect of their similar though several relations to the reason, the omitted and included cases are *analogous*, æqual, or *pares*.

But here, to prevent misconception, I must add the following remarks:—The several specific cases which are actually comprised by a statute, or the several specific cases which are comprised by a judiciary rule, are therefore *analogous* or *pares*: for the respective relations of the cases to the statute or rule which includes them are similar though several relations.

But when it is said of a litigated case, that it bears an analogy or parity to another case or cases, it commonly is not intended that the doubtful and litigated case is surely and indisputably included by a statute or rule in question. It commonly is meant that the litigated bears to the other case a specific or generic likeness; and that the former ought to be decided on account of the alleged resemblance, by a statute or rule in question on account of the resemblance alleged. Or else it is meant that the litigated bears to the other case a specific or generic likeness; but that the former ought *not* to be decided, although the resemblance is admitted, by a statute or rule in question, notwithstanding the admitted resemblance. Consequently, the asserted or admitted analogy of the litigated case to the other is not an analogy or parity lying in a likeness of their relations; or, at the least, it is not an analogy or parity lying in a likeness of their relations to a given statute or rule indisputably including both.

In truth, when it is said that a litigated case is *analogous* to another case, one of the following meanings is commonly imported by the phrase. It is meant that the litigated case bears to the other case a specific and proximate resemblance; and that the former ought to be decided on account of the alleged resemblance, by a given statute or rule in which the latter is included. Or else it is meant that the litigated bears to the other case a generic and remoter resemblance; and that the former should be brought or forced, on account of the alleged resemblance, within a statute or rule by which the latter is comprised: that is to say, that a new rule of judiciary law, resembling a statute or rule by which the latter is comprised, ought to be made by the Court, and applied to the case in controversy.

In any of the meanings which we have reviewed above, the term analogy signifies likeness: namely, likeness or resemblance of any nature or degree; generic and remoter likeness, as opposed to specific and proximate; or a likeness of several objects lying in a likeness of their relations. In any of the meanings which we shall review below, the term analogy denotes an intellectual process: a process which is caused or grounded by or upon an analogy (in one or another of the meanings which we have reviewed above).

1. Analogy denotes the analogising of several analogous objects: that is to say, the considering the several objects as connected by the analogy between them.

2. Analogy denotes an inference, or a reasoning or argumentation, whereof an analogy of objects is mainly the cause or ground.

The nature of the inference, or reasoning, may be stated or suggested thus. Two or more individuals, or individual or singular objects, are allied by a given analogy. It is known (or, at least, is assumed), before and without the reasoning, that a given something is true of one or some of these objects. But it is *not* known, before and without the reasoning, that the given something is true of the other or rest of these objects. From the given analogy, however, which connects these objects with one another, the following inference is drawn: Namely, that the given something which is true of one or some of these objects, is true of the other or rest. Or the nature of the inference or reasoning may be stated or suggested thus:—*A* is *x* and *y* and *z*. An analogy or parity

obtains between *A* and *B*; for *B* as well as *A* is *x* and *y*. We know (or, at least, we assume), before and without the reasoning, that *A* is also *z*. We do not, however, know, before and without the reasoning, that *B* is also *z*. But, since *B* as well as *A* is *x* and *y*, and we know, the reasoning apart, that *A* is also *z*, we infer, by analogy, or parity, that *B* is also *z*. In short, from two antecedents or *data* which are known independently of the reasoning, we argue or proceed to a consequent which is unknown without it. From our knowledge that several objects are connected by a given analogy, and our knowledge that a further something is true of one or some, we infer that the further something is true of the other or others.

From the following passage in Quintilian, it seems that the Roman writers, as borrowing a term from the Greek, styled the reasoning in question, *analogy*; and that the Roman writers styled such reasoning *proportio* (sometimes also *comparatio*), when they turned the Greek expression into its nearest Latin equivalent. '*Analogiz, quam proxime ex Græco transferentes in Latinum proportionem vocaverunt, hæc vis est: Ut id, quod dubium est, ad aliquid simile, de quo non quæritur, referat; ut incerta certis probet.*'—Inst. Orat. l. i. c. 6. We have already quoted the definition of the term, given by the etymologist Varro: agreeably to his definition, analogy signifies the consequent yielded by the reasoning in question, rather than the reasoning itself.

But though the reasoning in question is styled *analogy* or *proportion*, it is styled more commonly reasoning by analogy or else analogical reasoning: *ratiocinatio per analogiam* or *argumentatio analogica*. It is styled also reasoning by parity, and since equality or *æquity* is tantamount to *analogy* or *parity*, it might be styled moreover reasoning by equality or *æquity*.

And here I may remark that the homely phrase *to liken* or *to liken one thing to another*, is equivalent to the finer phrase to reason by analogy or parity. We know that several objects are like in certain respects: We know that a something is true of some of these objects, although we do not know that the same is true of the others: From our knowledge that the former and the latter are like in certain respects, and our knowledge that the given something may be truly affirmed of the former, we infer that the given something may be truly affirmed of the latter. Now here in homespun English, we *liken* the latter to the former: that is to say, we argue them like the former in one

or more respects, since we know them, the inference apart, like the former in others.

In a case of analogical reasoning, the analogy of the compared objects may lie in a resemblance of their relations, or in another resemblance. On either of the two suppositions, the resemblance may be specific, and comparatively close or strong, or the resemblance may be generic, and comparatively distant or faint. In other words the objects from which we infer, and the objects to which we argue, may be parts of one species: or the former may belong to a *species*, parcel of a given *genus*, and the latter to another *species*, parcel of the same *genus*. Whatever be the nature of the likeness on which the reasoning is grounded, or whatever be the degree of the likeness on which the reasoning is grounded, the reasoning may be called with propriety, as it commonly is called in practice, *reasoning by analogy or parity*.

But such analogical arguments as are grounded on specific resemblance, and such analogical arguments as are grounded on generic resemblances, are not unfrequently distinguished by the following antithesis of phrases. An inference from singulars of a sort is grounded, it is said, on *experience*. An inference from singulars of a sort which is parcel of a given kind, to singulars of another sort which is parcel of the same kind, is grounded, it is said, on *analogy*.

For example: It is said that a physician would reason from *experience*, in case he reasoned thus: 'Some men have died or have suffered some other harm, on taking a certain drug; therefore, other men will die, or will suffer a like harm, if the drug be taken by them.' It is said that he would reason from *analogy*, in case he reasoned thus: 'Some animals of one of the lower sorts have died of a certain drug; therefore men will die of the drug, if it be taken by them.'

But such analogical arguments as are grounded on specific resemblances and such analogical arguments as are grounded on generic resemblances, are vaguely divided by a difference which is merely a difference of degrees. There is not the opposition of natures between the two classes of arguments, which seems to be expressed or intimated by the foregoing antithesis of phrases. For whether the likeness be specific or generic, an argument raised on a likeness rests upon two antecedents: first, the likeness between the objects from which we reason or infer, and the objects to which we argue; secondly, the given and further

something which we know or assume of the former, and which, by analogy or parity, we impute or ascribe to the latter.

Now, whether the likeness be specific or generic, each antecedent is known to us (either directly or mediately) by or through an experience which has occurred to ourselves or others. Consequently, whether the likeness be specific or generic, the reasoning is built on experience, and also is built on analogy. In respect of either antecedent, the reasoning is built on experience. In respect of that antecedent which consists in the likeness of the objects, the reasoning is built on analogy with which experience presents us. We know, indeed, through experience (helped by analogical reasoning) that such analogical arguments as rest on specific resemblances, are commonly worthier of trust than such as rest on generic. But this extremely vague, though extremely important difference, is merely a difference of degrees. Although an analogical argument raised on a stronger resemblance may be surer than a similar argument raised on a weaker resemblance, the natures of the several arguments are essentially alike or identical.

We will divide analogical reasoning into two principal kinds.

As concerned with matter of a nature which we shall endeavour to explain, analogical argumentation (supposing it justly conducted) is only contingently true: Or (changing the phrase) the something which is true of the object from which we reason or infer, is only probably true, or only contingently true, of the objects to which we argue.

As concerned with matter of another nature, which we shall also endeavour to explain, analogical argumentation (supposing it justly conducted) is necessarily or certainly true: Or (changing the phrase) the something which is true of the objects from which we reason or infer, is certainly or necessarily true of the objects to which we argue.

Analogical reasoning of the former kind we will call analogical reasoning concerning *contingent* matter. Analogical reasoning of the latter kind we will call analogical reasoning concerning *necessary* matter. We incline to believe that the latter is not commonly called analogical reasoning, and it certainly differs essentially from analogical reasoning concerning contingent matter. Accordingly, we have hitherto assumed, in treating of reasoning by analogy, that all analogical reasoning concerns contingent matter.

But to this we shall return below.

[Analyse analogical reasoning of the first kind, and compare it with syllogism and perfect induction, and with analogical reasoning (if such it can be called) which is concerned with necessary matter.]

I must now endeavour to distinguish Contingent from Necessary Truth.

Contingent Truth is truth not inseparable from a notion of the object: Our belief resting, not on a necessary connection of truth with the object, but on experience and observation (one's own or others') of their invaluable or customary conjunction: such as the experience of pleasure or pain as connected with objects of a given class: Our belief or expectation of future conjunction being (at least after experience) proportioned to the degree in which, in times past, conjunction has approached to invariableness. *E.g.* The death of men is expected with perfect confidence; but the effect of a drug on the human body, or of an object on the human mind, in the way of pleasure or pain, is expected with less confidence. The nature of the belief or expectation derived from past conjunctions, is not within the province of the logician, who takes the facts from the philosophy of the human mind. The belief or expectation seems to be confident before experience, and to be afterwards reduced to experience; widened by analogical reasoning founded on generic resemblance. It will be admitted by all, that our belief ought to be commensurate with the experience; *e.g.* with the proportion borne by individual instances *in which* the conjunction has been experienced, to individual instances *in which it has not*. Whether our belief is first absolute, and then proportioned to experience, or is first hesitating and gradually proportioned to experience, is not a question falling within the range of the logician.

In ordinary language, contingent truths are certain or probable. As opposed to necessary, *all* are contingent in the sense above explained; but, according as truth is accordant with *all* past experience, or only accords with past experience *generally*, it is certain or probable.

A contingent or probable truth does not necessarily belong to the object, although in fact no object of the sort has been known without it.

Necessary Truth is that which is true of all objects, like the objects argued from, by reason of their having that wherein they are analogous. A necessary efflux of *that*; a something without which the object cannot be conceived as having *that*.

[*e.g.* Triangles, as such. (Hobbes.) Law case of a class, as such: *i.e.* as abstracted from its individual peculiarities. Legal consequence true of it, etc.]

In all these cases the truth seems to be *proprium* or property, strictly so called. It flows necessarily from the essence of the object: *i.e.* from the properties (positive or negative or both) which make the object to be of the class to which it belongs: Although it is not itself of the essence: *e.g.* equality of the three angles of any triangle, etc.

Or, legal consequence deducible from a case.

* * * * *

Analogical Reasoning concerning Contingent Matter.

In pursuance of the order suggested above we shall proceed to analyse analogical reasoning concerning contingent matter.

1°. Induction; *i.e.* analogical reasoning extended to all other objects (or other objects generally and indeterminately), having the given analogy to the object or objects argued from. (Call it, at present, imperfect induction, or induction simply; being totally different in nature from what is commonly called perfect induction, and to which we shall advert below in conjunction with syllogism.)

2°. Analogical argument not involving any such universal or general illation; but regarding one or some individually determined singulars, having the given analogy to the objects argued from.

This latter, as opposed to induction, may be called particular reasoning; and may be drawn without adverting to others generally. But in so far as it will hold, it supposes that the truth applies universally or generally, and indeterminately.

The degree of assurance with which the particular conclusion may be embraced is proportioned to the approach to universality. *E.g.*: *A* has *x* and *y*. *A* has also *z*. *B* has *x* and *y*. Ergo, *B* has *z*. But why? Because all objects having *x* and *y*, or objects generally having *x* and *y*, have *z*: insomuch, that *B* is, certainly or probably, one of a number of objects having *z*.

This is what we do when we attempt to state the grounds of our inferences. Also, when, in confuting others, we suggest a contradictory case or cases. Immense importance of the habit: Most people being apt to assume from a few cases universally, and then to syllogise. This leads me to compare

syllogism as concerned with contingent matter, and particular analogical reasoning as concerned with the same.

[Distinguish analogical reasoning which is concerned with contingent matter, from syllogism and perfect induction, of which the matter is also contingent.

Analyse analogical reasoning (induction and particular) concerning necessary matter, and compare it with induction (necessarily perfect) and syllogism (necessarily concluding absolutely) as concerned with the same.]

In analogical reasoning as concerned with contingent truths, the truth or probability of the inference depends on two causes: namely, the truth of the two antecedents, and the invariable or customary connection of the second antecedents with other singulars like those from which we argue. If the antecedents are true and the conjunction invariable, the inference is certain: *i.e.* has the certainty which alone can belong to contingent truth (as explained above).

If the antecedents are true and the conjunction *not* invariable, the inference recedes from certainty in proportion to the recess from invariableness.

[Give examples of both cases.]

All analogical reasoning proceeds from a singular to a singular, or singulars, or from singulars to singulars, or a singular. But when we infer from singulars or a singular to one or some, it is usually called 'reasoning,' or 'particular reasoning.' When from a singular or singulars to the rest of the actual or possible class, 'induction.'

[Give example.]

But in every case, the process is essentially the same. For the confidence in a particular conclusion depends upon the approach to invariableness of conjunction: *i.e.* upon the possibility of an induction approaching to truth. Many inductions are founded directly on an analogy: *e.g.* What is true of one of a species, is true of other individuals. But this again rests ultimately on experience.

* * * * *

It appears from what has preceded, that reasoning by analogy or likeness (of any nature or degree) is grounded on two antecedents: first, the likeness between the objects *from* which we reason or infer, and the objects *to* which we argue;

secondly, the something, which (the inference apart) we know to be true of the former, and which, by analogy or parity, we impute or ascribe to the latter. But though these two antecedents are immediately the ground of the inference, the inference reposes also on a further or ulterior basis. For why do we argue from the likeness between the compared objects and the something which we know to be true of one, or some, of the objects, that the something is true moreover of the other, or rest of the objects? The nature of the ulterior basis on which the inference reposes is determined by the nature of the matter with which the inference is concerned.

In [some] cases of reasoning by analogy the truth of the analogical inference (supposing it deduced justly) is contingent, or probable: that is to say, the something that is true of the objects which the just inference is brought from, is contingently true of the objects to which the inference is carried. In other cases of reasoning by analogy, the truth of the analogical inference (supposing it deduced justly) is necessary or certain: that is to say, the something that is true of the objects which are justly argued *from*, is necessarily true of the objects which are justly argued *to*.

Analogical Reasoning as concerned with contingent Matter, distinguished from Syllogism and perfect Induction as concerned with the same.

Whatever there has been of reasoning, as meaning process from known to unknown, has been performed by an analogical argument (an induction), by which we obtained the major premiss.

[Give example.]

And, moreover, in contingent matter, syllogism is apt to mislead. It rarely happens that the major premiss can be universal, conformably with material truth, though the formal truth of the conclusion depends on assuming such material universality.

[Give example.]

Since then syllogism can give us no new truth, and since it may mislead, what is its use?

I incline to think that the important part is not syllogism. But terms, propositions, definitions, divisions (abstracted from

all particular matter) are all-important. It is a great error of most logicians to consider these as merely subordinate to syllogism, which is the most futile part. From my friend John Mill, who is a metaphysician, I expect that these, and analogical reasoning and induction, abstracted from particular matter (which are the really practical parts), will receive that light which none but a philosopher can give. For though logic is a formal science, and takes its truth from others, none but a metaphysician can determine its boundaries or explicate it properly.

[Necessity for illustrations from numerous sciences.—Many of the methods seemingly peculiar, would be found universal or general.]

A something equivalent, or nearly approaching, to syllogism, always happens when we state in our own minds the grounds for a conclusion in a particular reasoning: *e.g.*:

A is *x* and *y*. *A* is also *z*. *B* is *x* and *y*. *B*, *ergo*, is also *z*. But why? Because all singulars being *x* and *y* are also *z*, or singulars being *x* and *y* are generally and indeterminately *z*. In other words, we can only infer from *A* to *B*, on the supposition that *A* is the representative of a whole class, or of singulars generally contained in a class. The argument, therefore, must be put thus: All singulars being *x* and *y*, or the singulars generally which are *x* and *y*, have *z*. The singular or singulars forming the subject of the inquiry are *z*. Therefore, certainly or probably, *B* is *z*. And this would be much more convenient than the ordinary syllogism, which assumes in the major premiss a universality commonly false in fact, and which, therefore, must be denied again in the conclusion. For the conclusion, in fact or materially, cannot be absolute, unless the universality assumed in the major premiss be materially true.

[Use of syllogism (or analogous process), in leading us to review grounds: In confutation:—reminding antagonist that he has assumed something not tenable.]

But, in fact, we never syllogise, though we perform an analogous process. We run the mental eye along the analogous objects, and if we find them contradictory, etc., we conclude probably, or reject, unless we find special reason. Hence Locke's sarcasm.²²

* * * * *

In all particular analogical reasoning which is concerned with contingent matter, the truth of the inference (considered

²² See 'Essay on the Human Understanding,' vol. ii. c. xvii. § 4.

as such), depends on the truth of the antecedents (and on something else). And what I have said of syllogism, as to the dependence on terms and propositions, applies to perfect induction. As in syllogism, true of all, true of every, so in induction, true of every, true of all: *Vi materiæ, vi formæ* [materially or formally]. It follows that by syllogism we can arrive at no new truth, the conclusion being involved in the major premiss. We merely affirm of one what we had affirmed of all, including one. Or we merely affirm that the subject of the conclusion is one of the all, of which, in the major premiss, we had affirmed the predicate of conclusion.

Analogical Reasoning (Induction and Particular) as concerned with Necessary Matter. The Induction necessarily perfect. Syllogism as employed about the same Matter.

Now here we merely reason from a singular to a singular, as in the case of contingent truths. But the argument carries with it all the apodictic certainty which belongs to a syllogistic inference.

For A is a and b . A is also x : and A has x in such wise that every singular like it, in having a and b , must have x . B is analogous to A , in having a and b . Therefore B is of necessity x .

It is manifest that this is equivalent to the following syllogism. Every singular which is x is also z . B is a singular which is x . Therefore, B is also z .

But still there is this difference, that though, like a syllogism, the inference follows *formaliter*, it also follows *materialiter*. So that the cogency lies in the truth of the antecedent, and not in the relation and disposition of the terms. And, on the other hand, it differs from an analogical argument concerning a contingent truth. For the antecedent necessarily imports the consequent. Analogical reasoning is generally considered as being conversant about contingent matter, and therefore I have so considered it.

[Futility of syllogism in these cases.]

Much of the certainty ascribed to mathematical reasoning lies in the truths with which it deals being of this class. Or at least, in approaching so near them that the deviations may be thrown aside, and afterwards allowed for in the way of limitation

to the inference. This is also the case with many of the truths with which lawyers have to do. And hence Law (*teste Leibnitz*) much like mathematics. In either case, the cogency arises from the nature of the premiss.

[Eulogy on Law, from being connected, on the one hand, with Ethics and Religion, and on the other, not less fitter to form the mind to habits of close thinking than the most abstruse of the mathematical sciences. Also, to exercise the mind in evaluation of evidence regarding contingent truths.]

* * * * *

For example: Interpretation of part of a statute by another part: *interpretatio secundum analogiam scripturæ* (so called as applied to a statute, or to any other written document). Interpretation of a statute by a statute made by the same legislature *in pari materia*: *interpretatio secundum analogiam scriptoris* (genuine interpretation).²³

. . . The last, an inference resting in speculation. But often, a practical consequence built upon a perception and comparison of analogous objects; *e.g. similis similitum declinatio*.

The extension of a statute, etc. *ex ratione legis*, is an example of analogical interpretation (genuine).

Lower animals reason,—how? The process of inference which they employ ought to be called reasoning. They also compare and abstract, as a necessary forerunner to inference.

Description of perfect induction.

The same remarks apply. The consequent is contained in the premiss.

It follows not from the form, but by reason of the matter. For because *A* and *B* are *x* and *y*, and *A* is always *z*, it is not true that *B* is also *z*. Whatever truth there is, therefore lies, not in the form of the reasoning, but in the intrinsic truth of the antecedents: *i.e.* because the antecedents are intrinsically true, we infer the truth of the consequent.

In syllogism and perfect induction, that is, in formal argumentation, the conclusion follows, *ratione formæ*.

In material argumentation, the conclusion follows *vi materiæ*.

SYLLOGISM.

Endeavouring to suggest an answer to this pregnant and

²³ For the Analogy of Grammarians, see Stewart, 249, 250. Johnson, 'Analogy.'

difficult question,²⁴ we begin with discriminating, as sharply and clearly as we can, *formal* and *material* reasoning. By '*formal reasoning*' (the propriety of which expression will appear hereafter), we signify the process of *sylogism*, with the process of *formal induction*. The nature of these processes (to which we shall revert below) may be indicated briefly in the following manner. In the process of syllogism, a narrower proposition is extracted, by a formal and necessary influence, from a larger and universal proposition which contains the narrower implicitly: In the process of formal induction, a universal proposition is collected, by a formal and necessary influence, from *all* the singular propositions of which the universal is the sum.

By '*material reasoning*' (the propriety of which expression will also appear hereafter), we denote analogical reasoning in each of its principal kinds: namely, the reasoning which yields a consequent that is either singular or partial, and the reasoning which yields a consequent that is either universal or general. Of the difference between these processes (to which we shall revert below) the following is a brief description.—In every reasoning raised on a likeness or analogy, the analogical inference proceeds from an assumed singular or singulars to another singular or singulars: that is to say, it proceeds to one or more of all those various singulars which are connected by the given analogy with the singular or singulars assumed. But where it yields a consequent which is either singular or partial, it proceeds to one or a few of all those various singulars. Where it yields a consequent which is either universal or general, it proceeds, without exception, to all those various singulars, or to all those various singulars with more or less of exception.

We venture to name the inference which is merely singular or partial (or which yields a conclusion or consequent that is merely singular or partial), *reasoning by example*. For it seems identical with the process which logicians denominate *exemplum*, and which they describe usually in some such words as the following:—'Argumentatio in quâ unum singulare ex alio colligitur.' The universal or general inference is called emphatically *induction*, and is usually described by logicians in some such words as the following:—'A singulari ad universale progressio.' To distinguish it from the formal induction which is a necessary induction or inference, we style it *material induction*. And here we must remark, that, in treating of argumentation of any of

²⁴ The question asked by one of the 'What, then, is the use of syllogism?' class (apparently Mr. J. S. Mill), viz., —*S. A.*

the above-mentioned sorts, we always assume (unless we express the contrary) that the inference which we are considering is perfectly good or legitimate: that is to say, that the consequent has all the truth, in nature or in degree, which the natures of the reasoning and the case will allow the reasoner to reach.

With this remark, we pursue our attempted discrimination of *formal* and *material* reasoning: of the process of *sylogism* with the process of *formal induction*, and the process of *reasoning by example*, with the process of *material induction*.

In any legitimate syllogism of any figure or mode, the process of argumentation is virtually this. In the major proposition, or major premiss, we affirm or deny a something of *all* the individuals or singulars which constitute a given class. In the minor proposition, or minor premiss, we assume and affirm of a number of individuals, that they are *some* of the individuals which constitute the given class; or we assume and affirm of a single individual, that it is *one* of the individuals which constitute the given class. In the consequent proposition, or conclusion, we affirm or deny of the subject of the minor, what we affirmed or denied of the subject of the major.

Or the process of affirmation or negation which we perform in the conclusion, may be stated more clearly thus: What, in the major, we affirmed or denied of the *all*, we affirm or deny of the singulars or singular, which, by the assumption in the minor, are *some* or *one* of the all. Where a syllogism is affirmative, the process of argumentation runs in the following manner:

'Every *A* (all *A*'s constituting the given class) is *x*. But every *B* is an *A*: that is to say, *all* the singulars of the narrower class constituted by all *B*'s, are *some* of the singulars of the larger class constituted by all *A*'s. Therefore, every *B* is *x*.'

'Every *A* is *x*. But some *B*'s (of which the quantity or number is *not* determined) are *A*'s; or some *B*'s (of which the quantity or number is determined, but which are not determined individually or singularly) are *A*'s: or one *B* (not determined individually) is an *A*. Therefore, such some, or such one, are, or is, *x*.'

'Every *A* is *x*. But these or those (individually determined) *B*'s are *A*'s; or this or that (individually determined) *B* is an *A*. Therefore, these or those *B*'s, or this or that *B*, are, or is, *x*.'

Where the syllogism is negative, the process of argumentation pursues the following course:—'No *A* is *x*. But every *B* is an *A*: that is to say, *all*, etc. Therefore, no *B* is *x*.' 'No *A* is *x*. But some *B*'s (of which, etc.) are *A*'s; or some *B*'s (of

which, etc., but which, etc.) are *A*'s; or one *B* (not, etc.) is an *A*. Therefore, such some, or such one, are not, or is not, *x*.'

'No *A* is *x*. But these or those (individually, etc.) *B*'s are *A*'s; or this or that (individually, etc.) *B* is an *A*. Therefore, these or those *B*'s, or this or that *B*, are not, or is not, *x*.'

It may be gathered from the foregoing exposition, that the conclusion of every syllogism lies implicitly in the premisses; or that what is asserted by that, is asserted implicitly by these. In the process, therefore, of syllogising, there is not really an illation or inference. Inasmuch as the truth in the conclusion is parcel of the truth in the premisses, there is not a progression to a consequent really distinct from the antecedents. Really (though not formally), the process consists exclusively of two assertions: first, that a given something may be said truly of *every* of a given all; secondly, that every of the individual objects which form the subject of the minor (or the single individual object which forms the subject of the minor) is *one* of the given all.

It also may be gathered from the foregoing exposition, that the consequent or concluding proposition, *as being the consequent of the premisses*, follows from the premisses *by reason of their form*: that is to say, independently of any truth which the premisses themselves may contain, and even of any of the meanings which their subjects and predicates may import. Though each of the premisses asserts a falsity, or though its subject and predicate signify anything or nothing, the conclusion or consequent proposition, *as being the consequent of the premisses*, is deduced or deducible from these by a formal and necessary illation. 'Conclusio a præmissis colligitur, per necessariam et formalem consequentiam, propter legitimam præmissorum in mode et figurâ dispositionem.' That the conclusion follows from the premisses, independently of any of the meanings which their subjects and predicates may import, is shewn by the foregoing examples; wherein *A*, *B*, and *x*, may signify anything or nothing.

That the conclusion follows from the premisses, independently of any truth which the premisses themselves may contain, is shewn by the examples following. 'Every animal is a stone. But every man is an animal. Therefore, every man is a stone.' 'No animal is sentient. But every stone is an animal. Therefore, no stone is sentient.' Now in each of these syllogisms, the consequent proposition, *as being the consequent of its premisses*, is necessarily true; or (speaking

more accurately), it follows from its premisses by a legitimate and necessary inference. In the former syllogism, however, the major premiss is false; and the conclusion inferred from the premisses, as *not* being such conclusion, is false also. In the latter syllogism, each of the premisses is false; whilst the conclusion inferred from the premisses, as *not* being such conclusion, is true; but since the premisses are false, the truth of the conclusion, as *not* being such conclusion, has no connection with its truth in its quality of a true consequent.

In short, the *rationale* of the process of syllogising may be expressed by the following *formula*:—‘A something may be said or predicated of *every* of a given all: Every of a number of individuals, or one single individual, is *one* of the given all: What may be said or predicated of *every* of the given all, may be said of the subsumed every, or of the subsumed one, which, according to the subsumption, is *one* of the given all.’ It is manifest from this *formula*, that the truth or falsity of either of the premisses, or the significance or insignificance, of the subject or predicate of either, neither affect the consequence, nor the consequent, to which it leads. The validity of the consequence or inference depends exclusively upon two *data*: first, the unlimited universality of the affirmative or negative proposition which constitutes the major premiss; secondly, the assumption that the singulars or singular which form the subject of the minor, are, or is, of the singulars which form the subject of the major. These being granted, the consequent, as the consequent, follows by a necessary consequence.

* * * * *

Various singular objects are connected by a common resemblance which shall be called *z*: and by reason of this common resemblance they constitute, or might constitute, a given *species* or *genus*. But of *every* of these various singulars, when considered singly and severally, and also without respect to the actual or possible class, a given something, which shall be called *x*, may be affirmed or denied. Now what may be affirmed or denied of *every* of these various singulars, when considered severally, may also be affirmed or denied of every of these various singulars if they be considered collectively, and as forming or constituting the class.

Major premiss: Various singulars, including *A* and *B*, are connected by *y*. But *A* is, or is not, *x*; *B* is, or is not, *x*: And every other of the various singulars, as considered singly and severally, is, or is not, *x*.

Minor premiss: All these various objects, as considered jointly and collectively, constitute, or might constitute, the species or genus *Z*.

Conclusion: Every singular constituent of the actual or possible class is, or is not, *y*.

It is manifest that there is no illation. That what is true of every of the objects as considered singly and severally, is true of every of the same as considered jointly and collectively, and as being the constituent parts of an actual or possible class.

It is manifest that it follows by reason of the form. For let the major or minor be what it may, what is true of every when the objects are taken severally, must equally be true of every when the objects are taken collectively, and considered as bound together by a class or common name. Or that which is true of every unit of twelve when not considered as forming a dozen, is true of every of twelve considered as forming a dozen.

NOTES ON CODIFICATION.

It was not my intention to publish the following Notes on Codification, nor the notes on Criminal Law by which they are succeeded. They are, as the reader will perceive, mere memoranda, and appeared to me too incomplete and fragmentary to be submitted to the public eye.

But the earnest representations of more qualified and more impartial judges, as to the substantial value of these hints, have induced me to lay aside my scruples.

I have been reminded also by members of his profession, that the publication of these Notes is now peculiarly called for; and that even these slight indications of Mr. Austin's opinions will be received with interest and respect by all who are labouring in the difficult field which he explored. Though nothing can be further from my thoughts than to seek in the circumstances of the times a factitious and transient popularity for anything written by him, I believe I have no right to withhold even these imperfect contributions to the advancement of the great work which he had so much at heart.

The original MS. consists of two sets or packets of Notes, one of which is written in pencil. The repetitions have been omitted, and the whole arranged under the heads marked by the author. No other alteration in their form has been attempted.

Frequent reference is made to Lecture XXXIX., Vol. II., in which the subject of Codification is touched upon.—S. A.

By the fortunate recovery of the latter part of Lecture XXXIX., as printed in this edition from J. S. M.'s notes, much of the ground covered by the following notes is anticipated. As the following notes, however, were printed from the author's own MS., I have thought it best to reprint them here without alteration.—R. C.

The question of the expediency and practicability of Codification is double: general or abstract, and particular or concrete.

Considered in abstract, the question will not admit of a doubt. As a practical question, it is particular, and may admit of a doubt.

Objections, however, have been urged which apply to Codification generally. These I shall endeavour to answer, and

shall afterwards advert to the particular objections to codification in England; the difficulties to be surmounted, and the course which, in my opinion, ought to be pursued.

All law is statute or judiciary. Consequently all codification (of existing law) is resolvable into two parts:

1°. A re-expression and arrangement of statute law:

2°. An extraction from cases of *rationes decidendi*, and the stating them as general rules and arranging them:

3°. A conflation of both.

[Sorts of law *in posse*, authoritative treatises, etc., must be codified also, if really having the effect of law. The characteristic differences of statute and judiciary law lie (as I have shewn in my Lectures),²⁵ mainly in the form in which they are respectively expressed.

The interpretation of statute law and the peculiar process of abstraction and induction will be treated of hereafter.]

Admitting that codification is expedient as considered generally or in abstract, it follows not that it would be expedient here or there.

Dismissing the expediency of codification in particular with a brief indication of the considerations on which it turns, I shall confine myself to codification *generally*.

Order of treating the general question of Codification.

In considering codification in abstract, I shall consider,

First, its practicability:

Secondly, its expediency:

Thirdly, the objections (or the leading objections) which have been advanced against it.

The arguments to prove its practicability and its expediency, lie in a narrow compass; although, in my opinion, they are perfectly conclusive.

The demonstration of the nothingness of the objections occupies a considerable space.

The objections which I shall consider, go to codification generally; although the objectors commonly advance them with reference to codification here or there.

²⁵ See Lecture XXXVII. *ante*.

Practicability (and Advantages) of Codification (considered generally).

It is possible to extract from particular decisions, *rationes decidendi*; and leading principles and decisions. These, if stated in abstract (and exemplified) would be clearer than when lying in concrete: And would also be more general, abstract, and adequate, being so expressed as to apply to all cases falling under them, and not limited to the cases (with their accidents) by which they were established.

The induction (previous to the application) of the *ratio decidendi* of a decided case, is Codification *pro tanto*.

The practicability of codifying the statute law will not admit of a doubt. If it be practicable to establish general rules (in an abstract form) one by one and without system, it is practicable to establish a system of such rules. The consolidation of the statute law is an admission of this *pro tanto*; and nothing can be more inconsistent than the objections raised to codification by the friends of consolidation. For they object to the former, the impossibility of viewing completely the field of law.

Practicability (with difficulty) of Codification.

Practicability of codification:

With reference to such part of the law to be codified as is statute;

To such as is judiciary.

Its difficulty.

Difficulty of rendering it complete; of rendering it consistent, and of duly subordinating the less general under the more general:

Of extracting definitions and principles from judiciary law.

Great evil done to the cause of codification by representing it as easy.

Expediency of Codification.

The expediency of codification follows from a notion of the Law; from a statement of the respective natures of statute and judiciary law; and from the bulk and uncognoscibility of un-systematised law.

It is better to have a law expressed in generals, systematic,

compact and accessible, than one which lies dispersedly, buried in a heap of particulars, bulky and inaccessible.

Its expediency is admitted practically by treatises, redactions, etc.; many of which are, in effect, codes: those who talk loudest against redactions, availing themselves of them in practice. But redactions by private hands are not equivalent to codes.

The expediency of codification (in a particular case) must depend on a variety of considerations: especially on the quantity and degree of skill which it may be possible to bring to the enterprise.

The great difficulty is, the impossibility that any one man should perform the whole. But if done by several, it would be incoherent, unless all were imbued with the same principles, and all versed in the power of applying them. The great difficulty, therefore, is to get a sufficient number of competent men versed in common studies and modes of reasoning. This being given, codification is practicable and expedient.

Peculiarly technical and partial knowledge of English lawyers.

No English lawyer is master even of English law, and has, therefore, no notion of that inter-dependency of parts of a system on which successful codification must depend.

A code must be the work of many minds.²⁶ The project must be the work of one: and revised by a commission. The general outline, the work of one, might be filled up by divers.

All-importance in codification of the first intention. Till minds are trained, it will hardly succeed. How the difficulty is to be surmounted. Necessity for men versed in theory, and equally versed in practice;²⁷ or rather, of a combination of theorists and practitioners. Necessity for preliminary digests; or for waiting till successful jurists and jurisprudence are formed through effectual legal education.

Evil done to the cause by exaggerating the extent to which law may be made accessible to the laity.

²⁶ 'Männer, welche der Gesetzgebung, und insbesondere der allgemeinen, abstracten Gesetzgebung, gewachsen sind, gibt es sehr wenig, selbst im gelehrten Stande. Diess darf auch nicht befremden. . . . Denn eine gute Gesetzgebung ist das schwerste unter allen Geschäften; . . . die Kräfte vieler der Ersten müssen vereinigt werden, damit durch eine grosse Wechselwirkung etwas Gediegenes und Geründetes vollbracht werde.'—Thibaut.

—(*Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland.*)

²⁷ 'Mit einem allgemeinen Gesetzbuch wären dagegen Theorie und Praxis in die unmittelbarste Verbindung gebracht, und die gelehrten academischen Juristen würden unter den Praktikern ein Wort mitreden dürfen, während sie jetzt überall mit ihrem gemeinen Recht in der Luft hängen.'—Thibaut, *Noth.* etc.

How far, and how, law may be made knowable to the bulk of the community.²⁸

If law were more cognoscible (in respect of its principles and ends) to the bulk of the public, the public would call more discriminately, as well as more decidedly, for legal reforms: would support good innovations and scout bad projects of ignorant quacks.

Effect of Codification on the Character of the Legal Profession.

Law may be made accessible (in its whole extent) to lawyers.

Advantages that would thence ensue: by discharging law of mere rubbish, and simplifying it; and so leaving more leisure for the study of law itself and its rationale; and so inviting minds of a higher order into the profession:

By shewing the subordination of detail to principles, and relations of parts to one another; and so rendering the rationale of law manifest, and law a rational and interesting study:

By making lawyers complete masters of the body of law, and so rendering good advice cheaper and more accessible; and making local judicature practicable.

Without local judicature, preliminary examination of parties, etc., good administration of justice is impossible.

But the possibility of local judicature, etc., depends in part on substantive law.

With a local bar, there could not be the same division of labour as at present: therefore each man must be a complete lawyer; and that he may be, the bulk and complexity of law must decrease.

Floating jurisprudence must be reduced to the least possible quantity.

Such a reform in the law as is here contemplated would improve the character of the legal profession. Through improvement of their character, would lead to still further advances in legislation, and, generally, in ethics.

Through the improvement of the legal profession, chicane would be less frequent. The morality of the bar and of attorneys would improve. From compactness, simplicity and cognoscibility, mistakes in conveyances, contracts, etc., and, generally, in extra-judicial conduct, would be less probable and frequent.

²⁸ Thibaut, *Civil. Abhandl.* p. 423.

Codification of existing law, and innovation upon the substance of existing law, are perfectly distinct; although a code may happen to be wholly or partially new in matter as well as in form.

The codification now contemplated is merely a re-expression of existing law: the reduction of judiciary into statute, and the arrangement of both into apt divisions and sub-divisions.

[This must, however, be understood with some limitations. In order to attain the simplicity which is the end of codification, it may be expedient to abrogate certain inconsiderable rights. *E.g.* In order to get rid of tenures, you must destroy the reverter to the mesne lord, making compensation.]

A code, as meaning a body of law expressed in general *formulae* arranged systematically, and complete, is a modern idea.

The term 'Code,' as expressing such a body of law, and the term 'Codification,' as meaning the reduction of an existing body of law into such a code, are not expressive.

*Expediency of beginning with a Digest.*²⁹

No harm done, though imperfect.

If arranged, as nearly as might be, according to the future code, it would be a preparative, and, if well done, a proof of practicability.

It would form a school.

The difficulty (perhaps an insurmountable one) would lie in the plan. The plan being formed by one, and revised and extended by a commission, unity in detail might be preserved by the superintendence of such commission,³⁰ as well as by the fact of separate authors working upon a common plan. Several plans might be presented to the commission.

It would less alarm the profession and give notice to them of an impending code.

Necessity of conciliating lawyers, and injustice of certain attacks upon them.

A Digest ought to be a conflation of statute and judiciary law, arranged in relation to subjects (and without relation to different systems of equity, etc.). This would rouse men's attention to the vast quantity of equivalent and passive rules,

²⁹ It will be obvious to the reader that Mr. Austin employs this word in a totally different sense from that which it bears when applied to such works as Comyn's *Digest*, etc. ³⁰ Example of Suarez and the Prussian Code.

and would suggest the possibility of the conflation of Law, Equity, etc.

Whether Common Law and Equity, etc., ought to be kept distinct.

There might be two distinct Digests, one a statement of law according to subjects, the other of law according to jurisdiction. A Digest would serve as a guide to a future code; and to partial legislation in interim.

[Remark, that no reform considerably abridging the Law, could be effected without a minute and complete survey and statement of it.]

It would be a better index to existing law than at present exists; and a better institutional book. [The latter is indeed partly the purpose of Digests.]

A Digest cannot be supplied by separate and unauthorised hands; for no proportions would be observed in the parts, nor would the parts (not being constructed on a common plan) obviously, or even really, harmonise.

The length of such a Digest would be of no great moment: because abstracts and tabular views would serve as guides.

For the use of students, a systematic Digest ought to be accompanied by an historical one. An historico-dogmatical would not be convenient for reference.

In the historical Digest, the divisions would be the same as in the systematical, and Law on each head would be brought down to the system. It should not be a merely external, but an internal digest; an exposition of different doctrines.

For the use of students, Institutes ought to be compiled: being not merely abstracts of the Digests, but containing expositions of the principles of general jurisprudence, etc.

The historical Institute might in this respect be rendered extremely instructive:

E.g. By giving comparative views, historical and dogmatical, of English and Roman law.

A Digest should be, perhaps, composed in the manner of an analytic and demonstrative treatise: *i.e.* the rules and principles should be extracted from the statutes and decisions; and that such are the rules and principles which the statutes and decisions establish, should be shewn by examination and reasoning (where necessary).

This would lead to length; but that objection is answered already.

It would be the business of the general commission to abridge needless argumentation.

A mere extract of rules and principles (not in the words of the original authorities) would not inspire confidence: would be the proper form of a code intended to supersede existing law.

Mere extracts of generalities from authorities would be liable to the objections made above, as lying against Codes and Digests.

The general rules and principles should be carefully detached from the inductions, so as to shew the law in general terms, and prepare the way for a code.

Necessity for a standing Law Commission to supervise legislation, and work new laws into the Code:

To be aided by suggestions from judges and other practical lawyers: thus combining due deliberation and comprehensiveness with knowledge of actual exigencies.

Also, by suggestions from theorists.

The evils in the mode of making Statute Law mentioned by Park³¹ are imaginary.

It is impossible to prevent the growth of judiciary law; but it may be kept within narrow limits.

The decisions of the Court on the Code would not be more uncertain than other decisions.

Immense superiority of judiciary law formed on a systematic whole, to law of the same kind formed on an undigested chaos. It would itself be no more than an interpretation of, and complement to, the code.

The projected code might be extended to Ireland, Scotland, etc.: codifying, in each instance, the particular or local law, which would be applicable in preference to the code. This was done in Prussia. Codification ought to be universal.

Objections to Codification considered generally.

Objⁿ. 1°. That a code is necessarily incomplete; and cannot provide for all future cases.

Supposition that judiciary law provides for cases in *specie*, and therefore is not *finitum* (see Pandects, *ignorantia juris*) and knowable. Counter-supposition by Park.

³¹ 'Contre-Projet to the Humphreysian Code.' By John James Park. 1828.

[Savigny's triangle is not a deduction of unknown from known, but a mere subsumption of individual under general, or of less under more general.]³²

Answer.—Though it is not possible, by a Code (or any law) to provide for all future cases, a Code is less likely to be very defective than judiciary law; which is necessarily timid and inadequate.

And, at all events, *existing law*, by a Code, is given pure from particulars; whilst the comparatively small body of judiciary law formed upon it is formed on a compact and perspicuous whole, and may easily be wrought into it.

2°. That every case is decided by the joint application of several rules.

Answer.—But this applies to judiciary as to all law; no judicial decision being applicable to a concrete case. As put by Portalis, the objection shews that law is impossible. And in the case of well-made statute law, the rule is given: nothing but the labour of applying it remaining.

3°. That a Code is unalterable (or, at least, less malleable than a body of law formed by aggregation). Hence, a Code, if made in an incompetent age, saddles a more competent posterity with its own vices. And, hence, codified law does not adapt itself to the successive wants of successive ages so easily as law made bit-wise: it will perpetuate the defective ideas of that age, and retard the progress of society.

Answer.—The reverse is the truth, on account of the natural tendency of judicial legislators to legislate by analogy; and so to perpetuate the ideas of past ages, so far as is consistent with inevitable change.

4°. Superior malleability of Common Law.

Answer.—This supposes, if true, uncertainty, from perpetual alteration. Park makes the same objection to judiciary law. It is not inherent in any law.

The historical School of Jurisprudence, so far as they are right, concur with everybody. Their peculiar views of the value of history, exclusive of philosophy, are wrong.³³

³² The passage alluded to by Mr. Austin appears to be this:—'In jedem Dreyeck giebt es gewisse Bestimmungen, aus deren Verbindung zugleich alle übrige mit Nothwendigkeit folgen: durch diese, z. B. durch zwei Seiten und den zwischenliegenden Winkel, ist das Dreyeck gegeben. Auf ähnlicher Weise hat jeder Theil unseres Rechts solche Stücke, wodurch die übrigen gegeben sind: wir können sie die leitenden Grundsätze nennen. Diese heraus zu fühlen, und von ihnen ausgehend den innern Zusammenhang und die Art der Verwandschaft aller juristischen Begriffe und Sätze zu erkennen, gehört eben zu den schwersten Aufgaben unsrer Wissenschaft; ja, es ist eigentlich dasjenige, was unsrer Arbeit den wissenschaftlichen Character giebt.'—*Vom Beruf*, cap. iii. p. 22.

³³ See note, p. 1037, *post*.

[Government and Law as they ought to be in advanced societies, are not to be learned from the imperfect Institutions of barbarians. The circumstances in which they were placed were different from our own; their ability to form a judgment upon the institutions best adapted to their own circumstances, were not so great as our own.

But although Legislation must be bottomed in general principles drawn from an accurate observation of human nature, and not in the imperfect records called history, there are cases in which historical knowledge has its uses. *I.e.*: To explain the origin of laws, which are venerated for their antiquity.³⁴ To explain much of the law, which now exists; and to enable us to separate the reason of modern times from the dross of antiquity.

All systems of law have a common foundation in the common nature of mankind; but the principles which pervade them all, are fashioned and obscured in each by its individual peculiarities.

The good sense of legislators and judges in modern times is always obscured by, and often forced to bend to, the nonsense of their predecessors.³⁵ To understand Mansfield we must study Coke: Justinian is not to be understood without a knowledge of the rude institutes of the earlier Romans.]

Law (as it ought to be) is not deducible from principles knowable *à priori*, but from principles which must be obtained (through induction) from experience. No experience of actual institutions, independently of the principles which are obtained by experience of Human Nature, can be of any value.

5°. A Code is more liable to engender competitions of opposite analogies, than a body of law consisting of judiciary rules, or of judiciary rules patched with occasional statutes.

Answer.—But, as has been shewn,³⁶ the competition (incident to the application of law) is merely a consequence of the inconsistency of rules: an inconsistency arising commonly from their indefiniteness.

The argument, therefore, is no substantive objection to codification, but is merely another argument (namely, that a code is necessarily less definite than a body of judiciary rules) put in another form.

The very question, or at least the main question, between the advocates and enemies of codes is this; whether a code or a body of uncoded law be essentially most productive of a competition of opposite analogies: *i.e.* be essentially least definite, and generally least coherent.

[Explain what is meant by 'competition of opposite analogies.' See p. 632, *ante*.]

³⁴ See Bentham, *Defence of Usury*. ³⁵ Thibaut, *Versuche, Nothwendigkeit, etc.*

³⁶ See p. 641, *ante*.

6°. Tendency of codification to disturb rights and duties created by codified (and anterior) law.

7°. That no determinate leading principles will be followed consistently by makers of the Code, and the provisions of the Code will therefore be defective and incoherent.

Answer.—This is only true of incompetent makers.

Objectors to Codes sometimes suppose that a Code must consist of insulated and incoherent propositions. *E contra*, one of its chief merits would be an exhibition of dependencies.

If formed by induction and extraction from an existing system of law, it would possess the internal organic consistency attributed to law growing by aggregation; and would render that consistency more visible, by detaching the rules from the concrete matter, and arranging them systematically.

8°. That private expositions of the law by competent hands serve all the purposes which codifiers aim at.

That in an age having such hands, and therefore alone capable of successful codification, codification is therefore needless.

That, accordingly, no demand was made for a Code during the time of the classical jurists.

9°. That a code will not be fitted to the customs, prejudices, wants, etc., of the community; nor to experience.

It will not, like judiciary law, be a mere expression of anterior custom.

Answer.—This, besides being false, is applicable to all law, save judiciary, and statute law founded on custom.

10°. That the defects of a Code being more obvious than those of uncoded law, a Code would give greater opportunities for chicane.

For answer, see Lecture XXXIX.³⁷

Further answer: The argument is suicidal; for, if defects are more obvious, a Code must be more simple, compact, and intelligible, than an uncoded system.

Defects therefore were more curable, and also more evitable till cured.

11°. If the Code could be constructed with ease, it would be contemptible:

Difficulty is good, because the labour of surmounting it is laudable.

Answer.—Unhappily, an easy, and therefore little-worthy-of-praise, Code is not practicable.

³⁷ See p. 679, *ante*.

12°. Its effect in annulling and disturbing existing rights and duties.

Answer.—This has little application to a codification of existing rules.

It has, however, some: because the forms of existing rules would be modified (or the Code would be of no use) and the equivalence of rules in a new guise to rules in the old, might often be doubtful.

Old rules would remain in force with regard to rights and duties which had grown up under them.

13°. A Code (in order to approach to completeness) must consist of rules so minute and numerous that no man could learn or retain them.

Impossibility of providing completely for future particular cases:

Bulk and complexity which would result from the attempt to provide for them.

Answer.—Codification ought not to be a specification of cases, but a series of rules applicable to cases.

14°. Objection by Park, from the alleged infinitude of rules.

Answer.—If this were true, law would be impossible.

Perhaps he means that the future exigencies requiring new laws, and consequently the new law required, are infinite.

But who ever imagined the possibility of constructing a code which should provide completely for all future times?

But it were more possible to provide for future cases by a code than by judiciary law. Prætorian law is praised by the Digests for this very reason. Inconsistency of Hugo and others in this respect.³⁸

By Park the objection is thus answered:—

‘Supposing that which is impossible, viz. that all lawyers in this country were *equally* learned, there would be little or no litigation, compared with the immense multiplicity of transactions; because almost every point is so far settled or influenced by decision, that in ninety-nine cases in a hundred they would all be of one mind.’—Park, *Contre-Projet*, p. 195.

According to this, existing law *has* nearly provided for all possible cases: and whatever of uncertainty exists, arises, not from the incompleteness of the law, but from ignorance by lawyers of its provisions.

Consequently a reduction of this law to a compact, system-

³⁸ Merits and Defects of Statute and Judiciary Law. See Lecture XXXIX. *ante*, pp. 665, 678.

atic, and more accessible form, would remove the present ground of uncertainty, by rendering the law more generally known by lawyers.

But, in truth, his assertion is false, and contradicted by himself elsewhere.³⁹

A Code or systematic exposition (if well made) would possess all the advantages pointed out by Savigny,⁴⁰ and would therefore tend to make lawyers better lawyers than now.

It would shew the subordination of the detail to the leading principles, and the relations of these principles and detail to one another:⁴¹ would render the *rationale* manifest, and positive law interesting.

In a code or statute (if well made) the law is given. In judiciary law, not.

The difficulty of applying the same, whether law is statute or judiciary.

A case often (or always) consists of various parts, and cannot be decided by any one single rule.

But this is just as applicable, whether law be statute or judiciary.

The objection seems to suppose (contrary to the objector's own assumptions) that precedents are exactly in point, instead of merely furnishing rules.

The difficulty really consists in determining the rule (if any) within which a given case falls, or whether it falls or not within a given rule; and in conceiving distinctly the case, the law, and the relation of the case to the law.

But this proves merely that lawyers should know the law, should be capable of clear apprehension, and be good logicians.

Assuming a code well made, their knowledge of the law would be more perfect. The law would then be (as it was to the Roman Lawyers and Lord Coke) completely present to their minds, and suggested by a particular case.

Objections derived from the defects, errors, and alleged ill-success of actual Codes.

Admitting the defects, errors, and (to some extent) ill-success of such Codes:

³⁹ See pp. 49, 203, 206, 222.

⁴⁰ *Vom Beruf*, cap. 6. p. 48.

⁴¹ Thibaut, *Versuche*, vol. i. p. 175.

See also, Thibaut, *Nothwendigkeit*, etc. pp. 425 to 431.

Such defects, errors, and ill-success prove nothing against codification generally; or against codification in any particular country (including countries in which the codes in question were compiled and have obtained as law); unless such defects and errors, with the other causes of the ill-success, were necessary, and not accidental and avoidable.

Accidental and avoidable causes have rendered the French and Prussian codes unsuccessful to a considerable extent; though, after all, the failure of these codes has been much exaggerated.

Brief review of Justinian's Compilations, and of the French and Prussian Codes, for the purpose of shewing that the defects, errors, and ill-success of those particular compilations were owing to causes not necessary.

Justinian's Compilations.

In Justinian's Codex, statutes and decrees are mixed up; nay, *privilegia* are mixed up and confounded with rules and principles made for general application.⁴²

The compilers had some notion of the necessity of defining terms and principles in order to cut off all reference to anterior law.

As a further means of attaining this end, they left in much historical matter.

The Code and Pandects form properly the intended body of law; a body intended to be *complete*.

The Institutes (a book for the use of students, though also law), were derogating from the Code and Pandects, or supplemental to them.

The Novels are mere correctives of previous compilations.

Much of the Code and Pandects consists of judiciary law; and of judiciary law detached from particulars necessary to make them intelligible.

These compilations, therefore, are not a Code, *sensu hodierno*. They are a body or heap (without scientific arrangement) of statute and judiciary law: the latter so given that it must be gathered by guess from mangled documents.

It is remarkable that the compilers felt the necessity of definitions and expositions, omitted by the French redactors.

⁴² Thibaut, *Auslegung*; Spangenberg, *heutigen römischen Rechts*. (On the order of the Code and Pandects.)
 Einleitung in das römisch-Justinianische Gesetzbuch. Mackeldey, *Lehrbuch des*

Their (imperfect) contrivances to render a resort to the old law needless.

French Code.

The French Code contains no definitions of technical terms (even the most leading); no exposition of the *rationale* of distinctions (even the most leading); no exposition of the broad principles and rules to which the narrower provisions expressed in the code are subordinate.

Hence its fallacious brevity.

Brevity is of no importance except as it tends to perspicuity and accessibility.

In consequence of the want of such definitions, etc. (and of purposed incompleteness hereinafter mentioned) old law (or a body of jurisprudence formed upon old law) has been appended to the code.

[Such definitions are practicable (or no law is possible), though difficult; as I have endeavoured to shew in Lecture XXXIX., Vol. II. The imperative part of every law containing but a small portion of it, definitions and expositions are absolutely necessary.]

Inattention to a due settling of those all-pervading principles and main partitions or distinctions, upon a precise conception of which, consistency in execution of detail depends.

Success in codification (as I shall observe hereafter) must mainly depend on first intention: on aptness of plan.

Haste with which the *Projet* was compiled. Faults arising from ignorance and haste could not be corrected by the Council of State, who were more ignorant still; and who merely examined, bit by bit, articles of the *projet*, instead of examining the *projet* as a whole.

Original conception as to matter and arrangement, defective: a defect not to be cured by discussions on the plan conceived.

Ignorance and incapacity of the compilers; Ignorance of, combined with servile respect for, Roman law;—the main basis of the code. They knew little besides the Institutes, and have, therefore, blindly followed them, with all their *lacunæ*. They were ignorant of the most fundamental distinctions (e.g. *dominium* and *obligatio*). This last is a proof of their carelessness, as well as incapacity. No care has been had to amend the code, or to work in subsequent decisions and statutes.

Separation of the *Code de Commerce* from the *Code Civil*, and general misapprehension of the nature of the distinction between *jus personarum et rerum*.

It was not the purpose of the compilers to form a complete Code.

Bad as is the French Code, slight alterations in the text would supersede the interpretative decisions.

Structure of the Prussian Code.

It is not loaded with precedents, but with declaratory laws, provoked by particular cases. Such laws differ from the judicial decisions of the Court of Cassation.

Consequent necessity for letting in the old *Gemeines Recht* to explain it.

No care has been had to work the Novels into the code.

The Prussian Code was not intended to be a complete body of law, but merely a digest of the common and subsidiary law where local law obtained.

The *præjudicia* are of no authority.

There are no adequate definitions or expositions of leading terms and principles.

Subsequent legislation is not wrought into the code.

The applicable *Gemeines Recht* consisted for the most part of Roman and Canon law.

Notwithstanding these acknowledged defects, all practical men in Germany are codifiers.

Reasons for the hostility of a portion of the professors in the Universities.⁴⁸

Conclusions from the Review of Codes.

First; That their defects, errors, and partial ill-success were not the results of necessary causes.

Second; That in spite of such errors, etc., those codes are better than the body of law that they superseded.

⁴⁸ 'Am wenigsten lasse man sich aber dadurch irre machen, dass die gänzliche Umänderung unsers bürgerlichen Rechts unter den eigentlich gelehrten Rechtskennern vielleicht die mehrsten Widersacher findet. Das wird stets so bleiben; und jetzt ist es gar nicht anders zu erwarten: . . . für kräftige Umwälzungen wird die Mehrzahl der eleganten Juristen nie gestimmt seyn. Keiner von ihnen übersieht in der Regel das ganz Recht; wenigen von ihnen werden die

Bedürfnisse des Volks durch Beobachtung klar; und die mächtige Triebfeder des Eigennutzes wird keinen in Bewegung setzen; vielmehr wird es immer vorthellhafter für sie seyn, die mühsam errungenen kritisch-historischen Schätze in gehöriger Sicherheit zu halten, und gegen bessernde Einrichtungen zu kämpfen, damit ihnen nicht die Pflicht werde, den neuen Menschen anzuziehen. —Thibaut, *Nothwendigkeit etc.*

Conclusions as to Savigny's Arguments founded on such defects, etc.

Great respect is due to the opinions of Herr von Savigny, which no man feels more strongly than myself.

All the objections which I have noted and answered above are advanced by him.

His book is directed against codification in a particular country, and even against a particular scheme of codification for that particular country ; but, nevertheless, many or most of his arguments apply to codification generally.

The objections peculiar to him are these :—

1. That in an age capable of producing a good code, a code were needless, the want being supplied by private expositors.

2. He asserts that during the ages of the classical jurists (who, he admits, were competent to the task), no want of a code was felt.

3. That a code makes the defects of law more obvious, and therefore emboldens knaves.

4. That if a code were easily to be constructed it would be good for nothing.

To this I answer, that codes have no tendency to simplify the science of jurisprudence, or to abridge the studies of lawyers. They have a tendency to discharge it of rubbish.

The study of cases (as exemplars for the difficult art of applying rules) would still be necessary to lawyers, though a code were introduced.

He assumes that no determinate leading principles will be followed consistently by the compilers of a code.

He is not however opposed absolutely to all codification.

He is an advocate for a code which should include all but future cases ; and he has proposed a digest. He has himself suggested an important argument to shew that the main difficulty in the way of codification is not insurmountable. But he would wait (for improvement) till better jurisprudence and jurists are formed.

His proposal of a digest is inconsistent with his main reason to shew the inexpediency of codification in Germany.

His opposition to Codes is the effect of *gelehrter* prejudice in favour of Roman law, and of national antipathy.

Nullity of his Treatise as an argument against codification generally, and even as an argument against it in Germany, the proper and special object of his attack.

Note.—As the great controversy on the expediency of constructing a Code of Laws for the whole of Germany is frequently alluded to in the foregoing notes, and constant reference made to the works of the two great leaders of the conflicting parties, it may not be superfluous to say a few words concerning them.

After the deliverance of the country from the French yoke, the minds of patriotic Germans were anxiously employed in inquiries into the causes of the feeble and divided resistance made by their country, and in projects for strengthening the bonds which might unite the several States into a well-compacted whole.

Among them, was that of which Thibaut was the ardent and eloquent advocate. In his Essay 'On the Necessity of a general Municipal (or National)⁴⁴ Law for Germany,' he treats the construction of such a body of law, 'clear, precise, and adapted to the requirements of the time,'—as one of the first conditions of a strong and efficient Confederation.

Thibaut was a Hanoverian by birth, and had studied at Göttingen, Königsberg, and Kiel, at which latter place he took his degree, and was appointed professor. In 1802 he had a call to Jena, and in 1805 he was invited to assist in the reorganisation of the University of Heidelberg.

Thibaut's works are numerous and of high authority.⁴⁵ His style is homely and familiar, but has great force and animation. He proposed that a Collegium or Commission should be nominated by the several States, and he maintained that by the co-operation of the ablest theoretical jurists (Professors in the different Universities), with practising lawyers, such a Code of Laws as above described, applicable to all Germany, might be constructed.

The most illustrious opponent of this scheme was Savigny, the leader of the so-called Historical School (founded by Hugo and Schlosser); whose great learning and acuteness, combined with a consummate talent for exposition, rendered him a formidable antagonist.

In his youth he had the rare advantage of being able to travel throughout Germany, France, and Italy, in search of unknown or neglected sources of Roman Law, and returned laden with spoils to Marburg, where he had studied, and was now appointed Professor. In 1803, he wrote his Treatise on the Law of Possession.⁴⁶ On the creation of the University of Berlin in 1810, Savigny was one of the first teachers appointed. His lectures, especially those on the Institutes, together with the history of the Roman Law and the Pandects, drew crowded audiences, not only by the copiousness and importance

⁴⁴ The word in the original is 'bürgerliches'—civil; but civil, as applied to Law, has a totally different meaning with us.

⁴⁵ The principal are—'Theorie der logischen Auslegung,' 'Kritik der Feuerbach'schen Revision der Grundbegriffe des Strafrechts,' 'Civilistische Abhand-

lungen' (of which Essays the 'Nothwendigkeit etc., so often referred to, is one), and the 'System des Pandecten Rechts,' which is regarded as his capital work.

⁴⁶ 'Das Recht des Besitzes.' Of this book Mr. Austin always spoke with enthusiastic admiration. It has been translated by Sir Erskine Perry.

of the matter, but by the extraordinary clearness and beauty of the form.

His celebrated work, 'On the Vocation of our Age for Legislation,' is known to the English public through Mr. Hayward's translation.

The discussion on the expediency of Codification was carried on with great asperity; its partisans complained that they were unfairly represented by the leaders of the Historical School, as advocating the introduction (or rather the imposition) of an entirely new body of Laws (which they never contemplated); while their adversaries disclaimed the opinion imputed to them—that Law should have no other source than a historical one.

In one of the Essays contained in the volume which has been frequently quoted, 'On the Influence of Philosophy on the Exposition of Positive Law,' Thibaut concludes with the following discriminating and impartial statement of the claims of the contending parties:⁴⁷—

'Nothing is more to be wished than that the philosophical and the elegant⁴⁸ jurists should soon cease to regard themselves as two hostile parties. Each side must abate somewhat of its pretensions, and reciprocally take what is good from the other. Without philosophy there is no complete history; without history, no safe application of philosophy. Both must unite as aids to Interpretation, and must exercise a continual influence on each other. The jurist who aspires after perfection will therefore endeavour to combine profound historical knowledge with philosophical views; for the historical part of Jurisprudence can never be separated by a sharp line from the philosophical. In each are gaps, which can only be filled by the aid of the other.'—S. A.

⁴⁷ 'Einfluss der Philosophie auf die Auslegung der positiven Gesetze.'—⁴⁸ See, for the use of the term 'elegancia juris,' p. 535, *ante*.
Translated by Mr. Lindley.

NOTES ON CRIMINAL LAW.

INCONVENIENCES OF THE PRESENT STATE OF THE CRIMINAL LAW.

INCONVENIENCES OF THE PRESENT COMMON LAW.

INSUFFICIENCY, bulk, dispersedness, and general uncertainty of the authorities from which the Law must be gathered.

1°. As to Reports :

2°. As to Records :

3°. As to the Treatises which are commonly deemed more or less authoritative.

These various authorities are extremely numerous, and also lie dispersed ; insomuch, that no lawyer has a complete collection of reports and treatises.

Much of the law contained in these reports and treatises has been repealed by statute or overruled by decisions. Great research is therefore requisite to distinguish living from dead law.

Hence, uncertainty.

§ 17. Generally, there is no mark or test by which authoritative decisions and authoritative opinions of text-writers can be sufficiently distinguished from the unauthoritative.

Uncertainty arising from the higher and lower authority of the judge or writer ; nature of the report ; circumstances under which the treatise was published ; &c.

Remarkable,—that, in practice, the decisions of Quarter Sessions are not authoritative.

Same as to Irish decisions.

Yet, in theory, these decisions (Quarter Sessions and Irish) are authority : and, consequently, decisions of the kind, conflicting with decisions resorted to practically, might be hunted out and produced.

Although the authorities from which the law must be gathered, were not bulky, dispersed, insufficient, and uncertain, still the law itself would be obscure and difficult of access, by reason of its being latent in judicial decision [and opinions analogous to them].

Difficulty of extracting principles from decided cases : especi-

ally where the grounds of decision are not sufficiently apparent from Report and Record.

Owing to this difficulty, principles are applied by judges timidly and capriciously.

It often happens, that a principle is not applied to a case clearly within it, because the decided cases establishing the principle do not tally with the pending case in immaterial facts and circumstances.

Hence, doubts thrown upon the principles themselves.

Immaterial facts are not unfrequently rendered part of the ground of decision. Decided cases are not treated as mere *indices* to the principles. (*Q^{ue}*.)

Difference between the construction and application of Statute Law, and the extraction and application of rules of law latent in judicial decisions. (*Q^{ue}*.)

Criminal Statutes are construed strictly. Hence the discrepancy between statute and common law is more striking in criminal law.

The shape of a statute differs essentially from that of a judiciary rule.

As a *whole*, a judicial decision is not a precedent, or has not the effect of a law.

Difference between Interpretation and Induction.

Judiciary law lies *in concreto*. Difficulty of extracting it. Nicety and uncertainty of the process.

The *ratio decidendi* is often conceived and expressed by the judge too narrowly or too broadly. Hence the law, *as expressed* (for the *ratio* itself ought to be deemed the law, independently of the expression of it), is often too narrow (immaterial circumstances being expressed as part of the reason), and sometimes too broad.

Much of present law is founded on antiquated notions :

E.g. With regard to the *subjects* of theft. Looking at the offence as conceived at present, there is no reason why things which are parcel of the soil should not be deemed subjects of the offence (if capable of a clandestine removal).

[*Maraudage*. Prussian Code.]

The same remark applies to the rule as to domestic animals ; as to choses in action ; and as to value of subject : as to goods of which there is no apparent owner or party entitled to possession ; and to the absurd reason given for absolving the wife from criminal liability.

Obscurity arising from partial adherence to, and partial departure from, these antiquated notions. Hence, Law, not a law founded on uniform principles, but a patchwork of laws formed on inconsistent principles :

E.g. Common Law rule as to *choses in action* only partially abrogated by statutes (and decisions).

Rule about *value* exchangeable (or intrinsic), still retained as to certain animals. Generally overruled, but yet retained capriciously in certain cases.

Partial and capricious extension of the definition of Larceny to cases of swindling and embezzlement. Larceny, if the thing be let out to hire and stolen by the hirer. Not Larceny, if the property, as well as the possession, be parted with.

Partial conversions of taking of things affixed to freehold into thefts, by statutes.

Hence, not only inconsistency and consequent obscurity, but needless multiplication of rules. A principle, admitted to be irrational, is maintained with exceptions, instead of substituting one uniform rule.

In so far as law is judiciary, this partial abandonment and partial retention of antiquated notions is natural, or nearly necessary. From the position wherein he is, the judicial legislator naturally legislates by analogy to the old law, in so far as the preservation of the old law is consistent with inevitable change. And hence, antiquated principles are perpetuated in laws after the grounds for them have ceased.

Circuitous and obscuring modes by which rules founded on antiquated notions have been often abrogated, wholly or partially.

By distinctions founded on immaterial differences :

E.g. The interval between taking and severance makes taking of an immovable, theft.

Obscurity arising from the frequent extension of definitions (through fictitious assumptions) to cases which are not properly within them, but are only related to cases within them by close or remote analogies :

E.g. Swindlings, breaches of trust, and other offences not properly thefts, are brought within the category of thefts by the fiction of a constructive possession.

LEGISLATION BY EXTENSION OF OLD RULES TO CASES
NOT WITHIN THEM.

According to the original and rational notion of theft, a taking possession, *without* the consent of the injured party (from the possession of the injured party), knowing, etc., and with intent to deprive, is of its essence.

But it is extended to cases in which the injurer obtains possession *with* consent of the injured, but with consent obtained by fraud.

In order to bring this last offence (properly swindling, or *filouterie*) within the definition of theft, a possession is feigned in the injured party, although he has parted with it.

It is also extended to cases in which the injured party has given up possession with consent not obtained by fraud.

Also, to cases of finding and misappropriation.

Also, to cases of embezzlement, where there is no delivery by the injured party.

Inconsistency, as well as obscurity, arising from the cause in question. Since, if the definition ought to be extended by reason of some analogies, it ought to be extended by reason of others. Insomuch, that any offence of any class might be thrust with propriety into any other class: since all offences are related by analogies more or less remote.

It ought to be remarked, in justice to the authors of the English Law, that this inconvenience is almost inseparable from a law formed gradually by Courts of Justice, etc.

The same obscurity, from the same cause, in the Roman Law. [Pandects, Book xlviii. *passim*.]

Has not been avoided by the compilers of the French and Prussian Codes: though they, as formers of a system created at once, had none of the difficulties with which the English Courts of Justice were embarrassed. (*Q^{ue}*)

Origin of fictions. Necessity of observing analogy.⁴⁹

Definitions and rules (owing to preceding and other causes) are not unfrequently conflicting, or, at least, indeterminate:

E.g. Several and inconsistent definitions of theft or larceny:

Uncertainty as to what shall amount to special ownership.

Uncertainty as to the nature of the *intention* which is of the essence of theft. The word *felonious* (like unlawful or criminal) does not define it, but merely indicates that it is of the essence of the offence:

⁴⁹ See Lecture XXXVIII. *ante*.

Nature of the criminal intention (or knowledge) which is of the essence of theft.

[Felonious—*Animus furandi. Malitia.*]

Materiality or immateriality of *lucri causâ*.

What motive is a *lucri causâ*.

Indifference of motive. Larceny is the taking without consent, knowing, etc. And unless this definition be abided by, this offence cannot be distinguished from various other offences : as malicious damage, embezzlement, etc.

Indifference of motive, shewn by rule as to exchange, etc.

Uncertainty of this rule.

Theft or Larceny is properly an offence against right of possession.⁵⁰ If not, an owner could not steal his own goods.

Consequently, any right of possession as against the taker ought to suffice ; yet there are doubts as to whether such right of possession resides in certain custodees, etc. [or whether, in the language of the law, they can be deemed special owners].

No right of possession in owner (as against thief) where the goods are hired ; though there is when they are bartered.

Inconsistency of holding taking goods not to be an offence, where the purpose is merely to apply them to some temporary use.

Same confusion of inducement and criminal intention as noted above in case of *lucri causâ*.

Uncertainty of rule as to finding and misappropriation.

Inconsistency of holding bailee generally not answerable criminally, and yet custodee answerable ; and of holding bailee answerable where bailment is determined.

Principles obscured by being often couched in Latin terms not generally understood and not unfrequently misapplied ; *E.g. Lucri causâ. Larceny*, instead of the familiar and more precise *theft*.

Larceny, or *latrocinium*, not theft.

INCONVENIENCES OF THE PRESENT STATUTE LAW.

The Statute Law is not of itself a substantive and intelligible whole, but a mass of partial supplements, and partial correctives, made, *pro re natâ*, to the Common Law. (The latter, the *nucleus*.)

Hence, often inconsistent. It lies dispersedly through many statutes and decisions upon them.

⁵⁰ In Scotland the style of Indictment as 'the property, or in the lawful possession of C. D.'—R. C.

Hence, bulk, inaccessibility, etc.

And, generally, it is productive of most of the inconveniences before pointed out in the Common Law.

Wherever the *basis* or *nucleus* of statute law is a judiciary law, the former is irregular, fragmentitious, etc.

INCONVENIENCES FROM THE EXISTENCE OF TWO DISTINCT BODIES OF LAW; ONE COMMON AND THE OTHER STATUTE.

As the Law actually stands, the law relating to any given offence commonly or frequently lies through many dispersed statutes and many dispersed reports or treatises.

Supposing that the Common and Statute Law were each systematised separately, the law relating to any given offence would often lie in two bodies of law; instead of lying in one department of one body of law.

By the incorporation of the two statutes, great benefit will result, for the following reasons:—

The present statute law consists partly of definitions of offences, with their punishments: and partly of the punishments of offences, leaving the definition of them to the common law: and it were expedient either that it should not be necessary to look after the definition of an offence in one statute, and its punishment in another; or that this should prevail in every case, and not in one only. The like observations apply to process.

The two statutes when separate must be often obscure and prolix, where the union of the two would tend to brevity and intelligibility.

The advantage would be gained of treating the *generalia* (of law or procedure) apart from those portions of the special part to which they are applicable indifferently: *E.g.* Misapprehension of right; accident; mistake; felonious intent; principals and accessories.

Many of these *generalia* (in existing treatises) are either omitted, or are stated under some head devoted to some particular class of offences (thus wearing the appearance of particular provisions). *E.g.* Malice, Negligence.

The advantages which would ensue from such an arrangement cannot be shewn fully without a scheme. Such scheme, pursued considerably into detail and backed by reasons, ought to precede the process of consolidating and combining.

As remarked above, Codification, and Innovation on substance or effect, are distinct. The codification here recom-

mended would not necessarily touch substance or effect; but would be no more (necessarily) than a re-expression of definitions, and an arrangement of offences under apt kinds and sorts, etc. But though the refount of form, now recommended, would not touch necessarily the substance or effect, still it might not perhaps be possible to render it altogether so good as desirable without small changes in substance. *E.g.* Reduction of rule in larceny as to right of possession.

ADVANTAGES OF COMBINING COMMON AND STATUTE LAW INTO ONE STATUTE OR CODE.

One source substituted for two.

Rules stated once for all, instead of being stated partly in one statute and partly in another.

Hence, more compendious.

If common law were reduced into one statute, and statute law consolidated in another, they might often conflict. If combined, no such conflict.

If common and statute law were to be united into one statute, a refount of the present form of the law would be expedient.

Necessity of considering every part in relation to the rest, and not as detached.

Also, of defining broad principles, subordinating narrow principles under them, and elucidating by examples. The actual law is a rich mine of such examples; and indeed, generally, is more objectionable in respect of its form than in respect of its substance and effect.

If the two statutes were incorporated, or even if they were kept separate, it would be expedient to diminish their size, and at the same time to render their contents more accessible, by *reducing under one head* such matters as are constantly recurring and are separated under different heads.

E.g. Principal and accessory: attempts to commit offences, etc. etc.

If the two statutes were incorporated, or even if they were kept distinct, it would be necessary to settle with great attention the *arrangement* according to which existing statutes and existing common law upon particular subjects should be put together.

E.g. Whether, in the general statute of statute law, larceny should come next to forgery, or not? Whether jury process

and bail should be near each other? What the statute should begin with, what end with?

INCONVENIENCES OF THE PRESENT LAW, IN RESPECT TO THE
ADMINISTRATION OF JUSTICE.

In respect to the administration of justice by the judges on circuits, etc.

Owing to causes mentioned in preceding paragraphs, rules and principles are applied timidly and capriciously.

In fact, judges, as well as advocates, are guided by modern and unauthoritative treatises.

Opinions of judges on doubtful points gotten slowly.

IN RESPECT TO THE ADMINISTRATION OF JUSTICE BY JUSTICES
OF THE PEACE.

As they are not generally professional lawyers, they need compendious and perspicuous rules. [Importance of proceedings prior to commitment.]

They are necessarily incompetent to the delicate task of extracting principles from decided cases.

Difficulties which they experience from the multitude and dispersedness of statutory provisions; from the language and form of statutes; from the obscurity of rules of construction, etc.

Though they were competent to the administration of the law, they have not access to the host of statutes and authorities through which it lies.

In fact, therefore, they are guided by modern and unauthoritative treatises.

Vast extent of their jurisdiction.

Tendency of the present age to administration of justice by local or district courts.

Impossible that the administration of justice by such courts should be passable, unless the law be rendered more compendious and clear than it is at present.

INCONVENIENCES OF THE PRESENT LAW, IN RESPECT TO
LEGISLATION.

Owing to the bulk and dispersedness of statutes and authorities, innovations on existing law are seldom guided at present by an adequate consideration of the entire legal system. Hence,

for the sake of obviating some particular evil, greater evil is often done.

For the same reason, there is much needless legislation. For it often happens that the object of the change is sufficiently accomplished by actual law unknown to the legislature: or might be accomplished sufficiently by some slight alteration of the actual law.

INCONVENIENCES OF THE PRESENT LAW, IN RESPECT, GENERALLY, TO THE COMMUNITY WHO ARE BOUND BY IT.

If the foregoing difficulties are experienced by the Courts and Legislature, *a fortiori*, by the community at large.

In fact, not one in a thousand knows the laws which bind him.

If such are the difficulties in the way of lawyers, etc., the same are insurmountable to private persons.

Accordingly, scarce any but professional lawyers have any knowledge of the criminal law, although of necessity they must be bound by it.

PRACTICABILITY OF REDUCING COMMON LAW INTO STATUTE LAW, AND OF CONSOLIDATING STATUTE LAW.

If it be possible to extract principles *pro re nata*, it is possible to extract them once for all, and to put them in the form of rules.

The difficulty of the process is not disputed.

The practicability of consolidating statute law is admitted in practice. Indeed, it is little more than an affair of arrangement.

ADVANTAGES THAT WOULD FOLLOW SUCH REDUCTION AND CONSOLIDATION.

Advantage of having the law relating to any given offence collected under one or two heads, from numerous sources, through which it now lies dispersed:

Of having it in a cheap (as well as a compendious) volume.

Of separating living from dead law.

Indeed, a mere republication of actual sources (assigning respective weights) marking the law abolished, would be of itself no inconsiderable good.

No desire to exaggerate the extent to which Law may be made generally intelligible. But criminal law, for the most part, might be made intelligible to any man of average capacity. And this is the most important advantage.

It does not enter, generally, into the detail of rights :

(*E.g.* Larceny; which is properly an offence against the right of possession.)

Possibility of defining in criminal law the rights and duties of which crimes are violations, in so far as criminal law is concerned with them, without going into any such detail :

E.g. Without going into any detail of rights of property, an adequate definition of the right of possession as affected by theft (which is properly an offence against the right of possession), malicious mischief, etc., might perhaps be given.

Advantages of its being made perfectly intelligible to lawyers, which it might be.

As being more accessible, it would be more obvious to the legislature; and therefore much crude and inconsistent legislation would be avoided.

Advantages that have arisen from Peel's Consolidations.

SUCH REDUCTION AND CONSOLIDATION WOULD, AT LEAST,
BE HARMLESS.

Doubts would arise on application of law thus reduced and consolidated: But probably fewer than on application of the present law.

Pre-existing law would furnish ample means of construction, and interpretative decisions might, from time to time, be incorporated with text.

[Rules of construction to be framed, and to be considered as peculiarly applicable to the Criminal Code.]

By submitting the statute or statutes to the public or the profession before they were passed into a law, many of the causes of doubts might be obviated.

Such reduction, etc., would not amount to a change in the substance and effect of the existing law, but would simply be a re-statement of the existing law, in an orderly, compendious and accessible volume; with the determination of points confessedly uncertain.

! It would not, necessarily, have any retroactive effect.

! In fact, it would be a substitution of an authoritative

body of law, for the unauthoritative (and often defective) treatises, which (as we have already remarked) are practically the guides of the tribunals in the great majority of their decisions.

Imperfections of these.

Though never so perfect, they are unauthoritative.

Expediency of Codification admitted practically by such treatises, etc.

FRAGMENTS OF A SCHEME OF A CRIMINAL CODE.

| | |
|---|--|
| <p>The Criminal [or Penal] Code [or the law of Crimes and punishments].</p> | <p>The Code [or Law] of Criminal Process [or Procedure] and Preventive Police.</p> |
|---|--|

| | |
|--|---|
| <p>General Part [or Part I.]: Comprising the matters (definitions, distinctions, rules, principles, etc.) which apply universally or generally: <i>i.e.</i> by which have no exclusive or special regard to crimes of a various given class, but regard indiffer- ently all or the generality of the crimes embraced by the intended Code [or, particularised (or specified) in the Particular (or Special) part].</p> | <p>Particular (or Special) Part, or Part II. Particularising (or specifying) the various crimes embraced by the intended Code; and assigning respectively to those crimes, their respective punishments and other penal consequences.</p> |
|--|---|

[Each part to be divided into Chapters, Sections, Subsections, etc.; or into Books, Chapters, Sections, Subsections, etc.]

NOTE.

'Punishment' (and 'penal') are broader expressions than 'crime' (and 'criminal'). Punishment (or *pœna*) is necessarily annexed to an injury considered as a crime or public wrong: *i.e.* as the possible ground of a criminal or public action; and the infliction of punishment is necessarily the scope or object of every such action or pursuit.

But punishment, moreover, is sometimes annexed to an injury considered as a civil or private wrong: *i.e.* as the possible ground of a civil or private action. And the infliction of punishment is sometimes the scope or object of such an action or pursuit. Consequently, the nature of 'crime' (and 'criminal') cannot be determined sufficiently by merely determining the nature of 'punishment' (and 'penal').

GENERAL PART OF THE CRIMINAL CODE

CHAPTER I.

The definition of a crime ; with distinctions (or divisions) of Crimes into certain of their principal classes.

CHAPTER II.

Of the territory embraced by the intended Code ; and of the persons amenable to, and the crimes cognisable by, the Criminal Tribunals having jurisdiction therein.

Reference to the subsequent Chapter, on Punishments ; and to those parts of the Code of Procedure which determine the respective jurisdictions of the several Criminal Tribunals.

[This distinction or division can hardly serve as a basis for the Arrangement of Crimes.]

CHAPTER III.

Of such essentials of a crime (or of such conditions necessary to render an act or omission a crime) as may be treated of generally: *i.e.* without restriction to a crime of a given or specified class.

Here, particularly, of those universal essentials which are styled emphatically 'the grounds of imputation.'

CHAPTER IV.

Of consummate crimes and criminal attempts.

CHAPTER V.

Of principals and accessories.

CHAPTER VI.

Of punishments (including the penal consequences which are not punishments nominally, but which are punishments in effect).

THE GENERAL PART OF THE CRIMINAL CODE.

CHAPTER I.

Containing the definition of a Crime; with distinctions (or divisions) of Crimes into certain of their principal classes.

1. The definition of a Crime, [or, Crimes distinguished from Civil Injuries;] [or, Public Injuries (or Wrongs) distinguished from Private.]

The definition of a Crime implies the definition of Punishment, and *also* the distinction between Civil and Criminal Actions. But the complete statement of this distinction, and of its numerous and intricate consequences, belongs to the Code of Criminal Process.

2. Of such distinctions (or divisions) of crimes as are founded on differences between their respective punishments; [between the criminal tribunals to which they are respectively attributed; and between the criminal processes by which they are respectively pursuable.]

NOTE.

The distinction between Crimes in respect of tribunals and processes, supposes a reference to the Code of Criminal Process: in which the competence of the various tribunals must of course be determined; and in which the regular process, with the processes deviating from the regular, are particularised or detailed.

The distinction between Felonies and Misdemesnors supposes a reference to the Chapter (contained in a subsequent portion of the General Part of the Criminal Code) on Punishments and other Penal Consequences.

Quære. The use of retaining the distinction between Felonies and Misdemesnors? It is founded on differences between their respective punishments and other penal consequences. And to every crime particularised in the Particular Part of the Criminal Code, its punishment (and other penal consequence) will of course be assigned.

The distinction in the French Penal Code between Crimes, Delicts, and Contraventions, is perhaps of some use. For offences of those different classes are attributed systematically and exclusively to differently constituted tribunals: They also are pursuable respectively by different processes.

Method of Arrangement in the French Penal Code.

Crimes attributed to the Courts of Assize, and pursuable by a process which is more solemn (and regular):

Called, emphatically, *Crimes*.

Crimes attributed to the Tribunals of Police, and pursuable by processes which are more summary (and irregular).

Pursuable before the Tribunals of *Correctional* Police.

Called *Delicts*.

Pursuable before the Tribunals of *Simple* Police (or Tribunals of Police).

Called *Contraventions*, or *Crimes of Simple Police*.

[The 1st and 2d Books, with the 'Preliminary Dispositions,' constitute the *General Part*: The 3d and 4th books, the *Particular Part*.]

CRIMES

attributed (generally¹) to the ordinary (or regular) tribunals,^{2*} and pursuable (generally^{3*}) by the ordinary or regular process.^{4*}

CRIMES

attributed to extraordinary (or exceptional) tribunals, and pursuable by extraordinary (or exceptional) processes.

Felonies.

Misdemeanors.

Distinguished by differences between the punishments (and the other penal consequences) which are respectively annexed to them.

[Not universally: For treason by a peer (for example) is cognisable by the House of Lords, although it is a felony.] [*Que.* Whether the House of Lords can now be deemed an ordinary criminal tribunal?]

E.g.

Crimes pursuable summarily before Justices of the Peace, or before Commissioners of the Excise. Crimes pursuable before the Ecclesiastical Courts. Crimes by military persons considered as such, and punishable before Courts Martial, etc. etc.

[*Que.* Whether the term *misdemeanor* is applicable to any of the crimes here contemplated? And whether there be any distinction be-

* Notes 2, 3, 4, on following page.

² *E.g.* The King's Bench; the temporary tribunals formed by the ordinary commissions, etc. etc.

³ Not universally; though cognisable by the regular tribunals. *E.g.* Peculiarities of process in case of treason.

⁴ Indictment.

tween such crimes, or any of them, analogous to the distinction between Felonies and Misdemeanors?

The simple 'police crimes' of the French Penal Code comprise only a part of the crimes here contemplated.]

NOTE.

Q^a. The extent of the intended Code in respect of the Classes of Crimes which it is meant to embrace.

Is it to embrace *all* crimes (crimes pursuable before the extraordinary, as well as before the ordinary tribunals)? Or are any, and which, of the crimes pursuable before the extraordinary tribunals, to be excluded from it? Difficulty of such an exclusion, in respect of such of the excluded crimes as owe their creation to unwritten law. See the last article of the French Penal Code, which shews that the code extends only to a part of the field embraced by the Criminal Law obtaining in France.

3. Distinction (or division) of crimes into Public Crimes and Private Crimes [or Private Crimes and Public Crimes].

[The arrangement of the *Particular Part* of the Criminal Code is founded on the distinction between Private and Public Crimes. But perhaps the nature of the distinction ought to be stated or indicated at the outset of the *General Part*.]

4. Distinction (or division) of crimes into *crimes by commission* and *crimes by omission* [or, *positive crimes* and *negative crimes*: — '*crimes faciendo*' and '*crimes non faciendo*'].

Distinction of crimes by omission into *crimes by omission accompanied with criminal knowledge*, and *crimes by omission from negligence (or criminal inattention)*. [Refer to Chapter III.]

[Crimes by omission accompanied with criminal knowledge might be styled commodiously *criminal forbearance*; crimes by omission from negligence, *criminal omissions* or *omissions* (simply). — But established language would hardly admit of this.]

NOTE.

Criminal knowledge and negligence are often styled emphatically 'the grounds of imputation;' inasmuch as the one or the other of them is of the essence (or *corpus*) of every delict (or crime). Properly,

however, *every* essential of a given crime (or every constituent of its essence or *corpus*) is one of the grounds or reasons for imputing the fact to the party. (See Table II. *post.*)

CHAPTER II.

Of the *Territory* which the intended Code is meant to embrace; and of the persons amenable to, and the crimes cognisable by, the Criminal Tribunals or Courts having jurisdiction therein.

1. *Q^{ue}*. The extent of the intended Code in respect of territory.

Is it to extend to *all* those parts of the United Kingdom and its Dependencies in which the Criminal Law of England now obtains?

If any of those parts are not to be embraced by it, how is their exclusion to be marked?

In respect to any of those parts embraced by it, in which anomalies or singularities now obtain,—how are such anomalies to be treated? Is the Code to supersede them? and, if so, how is the abrogation of them to be accomplished? If the Code is not to supersede them, are they also to be codified or systematised? (Provincial Law, derogating from the General or Common Law, has been codified or systematised in Prussia with respect to one of the Provinces.)

2. Persons amenable to the Criminal Tribunals having jurisdiction within the intended territory.

A statement of the general rule, or general principle.

Exceptions from the general rule: *e.g.* the King, corporate bodies in their corporate capacity, Ambassadors from foreign States, etc. etc.

3. Crimes cognisable by such tribunals.

A statement of the general rule or principle.

Exceptions from the general rule:

E.g. Crimes committed by British subjects in foreign parts.

CHAPTER III.

Of such essentials of a crime [or, of such conditions necessary to render an act or omission a crime] as may be treated of generally: *i.e.* without restriction to a crime of a given or specified class. Here, particularly, of those universal essentials which are styled emphatically 'the grounds of imputation.'

Principle 1. An act or omission is not a crime (or is not imputable to the party), unless the party knew, or, with due attention, might have known, that, under the circumstances of the fact, it was a crime; [or, an act or omission is not a crime, (or is not imputable to the party,) unless the party subsumed the fact, or, with due attention, might have subsumed the fact, under the law.]

Every crime, therefore, supposes, on the part of the criminal, *criminal knowledge* [criminal consciousness] or *negligence* [criminal inattention, criminal inadvertence].—*Vel scienter, vel negligenter.*

NOTE.

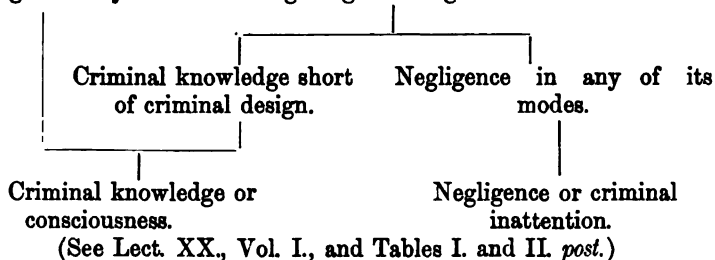
Scheme of the Roman law-language in regard to the grounds of imputation: *i.e.* Criminal knowledge and Negligence.

Dolus or *dolus malus*, when used as the name of a *genus*, is equivalent to *malice* or *criminal design*. When used as the name of a *species*, it is restricted to *criminal design consummated or attempted by fraud*: *dolus* with *simulatio*.

Culpa (which generally, though not always, is opposed to *dolus*) has three significations. 1°. Taken with its large signification, *culpa* is equivalent to the English *guilt*. 2°. Taken with its narrower signification, it denotes generally the ground of imputation: *i.e.* criminal knowledge or negligence. It therefore includes *dolus*. 3°. Taken with its narrowest signification, it denotes criminal knowledge *short of criminal design*, or negligence. It therefore excludes, and is opposed to, *dolus*.

The Roman law-language in regard to the grounds of imputation may therefore be presented thus:

Dolus, or *dolus malus*, as signify- *Culpa*, as opposed to *dolus* in its ing generically criminal design. generic signification.



Inconveniences of 'malice' as a name for criminal design.

1. It having been assumed inconsiderately that malice or criminal design is of the essence of *every* crime, the term is extended abusively to negligence (or criminal inattention), and to criminal knowledge short of criminal design. *E.g.* Murder is styled malicious, or the law (it is said) implies it to be malicious, although, in truth, it proceeded from negligence: *i.e.* from negligence, evincing, on the part of the criminal, extraordinary inhumanity. Case of master killing apprentice, without designing his death, by a cruel excess of punishment.

2. Malice as signifying criminal design (and as used with its technical and proper import), is often confounded with malice as denoting malevolence; insomuch that malevolence (though the motive or inducement of the party is foreign to the question of his guilt or innocence) is supposed to be essential to the crime. *E.g.* The law (it is said) implies malice, wherever the fact was premeditated; although the crime is complete by virtue of the criminal design, and any implication is superfluous. (Bellingham's argument.)

Similar ambiguity, and consequent confusion, in regard to *dolus*.

3. Though 'malice' denotes properly criminal design or intent, it sometimes signifies criminal knowledge short of criminal design. It seems, at least, that 'maliciously' is sometimes equivalent to '*scienter*.' (*Sed q^{uo}.*)

[(a) Criminal knowledge [or consciousness].

Criminal [unlawful, or evil]
design [intent, or purpose].

[Equivalent to the *malice* of the English Law; to the *dolus* or *dolus malus* (used generically) of the Roman; and also to the *malum propositum*, the *malum consilium*, and the *voluntas nocendi* of the Roman.]

Where the production of the mischievous consequence which the law seeks to prevent, is an *end* (or object), ultimate or mediate, of the criminal; and where, therefore, the criminal *wishes* (or *wills*) the production of it: *E.g.* Murder, or arson, out of malevolence; murdering to rob; theft. In each of these cases, the production of the mischievous consequence is the very end of the

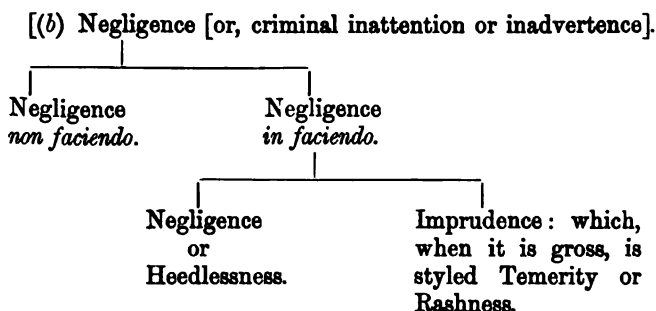
Criminal knowledge short of criminal design.

[*Scientia*, but without the '*voluntas nocendi*.' Not *dolus*, although it is *prope dolum*.]

Where the production of the mischievous consequence which the law seeks to prevent, is not an end, ultimate or mediate, of the criminal; but where he *knows* that such mischievous consequence (though he does not *wish* the production of it) will follow, necessarily or probably, his act or omission. *E.g.* Arson of a house adjoining his own, through his setting fire to his own,

criminal, or, at least, is a mean to its attainment. with intent to defraud his insurers. The destruction of his neighbour's house will not subserve his end; but he knows that the destruction of his neighbour's house will follow, necessarily or probably, the firing of his own.

[Where an act or omission is of itself a crime (or is a crime without respect to a consequence), such act or omission (supposing that the omission is accompanied with criminal knowledge) imports necessarily a criminal design.]



(See Table II. *post*, and Lecture XX. *ante*.)

Negligence, or criminal inattention, may be divided into *proximate* and *remote*: *proximate*, where it accompanies (or is the immediate cause of) the criminal omission or act; *remote*, where it has caused an inability, on the part of the criminal, to do or forbear as he ought.

Amount (or measure) of the attention which the criminal law exacts; with the various degrees of negligence (or criminal inattention). *Culpa lata*, etc. Impossible to fix a measure, or to distinguish degrees, by rules binding the tribunals: but principles (with examples), serving as guides to their discretion, may be stated or indicated in the law.

(c) Of the cases in which a party committing or attempting a crime, produces *casually* or *negligently* an extrinsic mischief. Peculiarity (and seeming unreasonableness) of the English Criminal Law in respect of extrinsic mischief produced *casually*.

Culpa dolo determinata. But, properly, the original crime or attempt is one crime, and the extrinsic mischief proceeding from the negligence of the party is another and distinct crime.

(d) Justifications deducible from principle 1, viz.

Ignorance (including mistake) in regard to matter of fact.

[Ignorance of law is neither a justification nor an excuse, as considered substantively or *per se*; although it is implied by some of the justifications and excuses which are adverted to hereafter. Why a knowledge of the law, on the part of the accused, is and must be presumed *juris et de jure*. Inasmuch as the presumption in question often conflicts with the fact, and the accused might be ignorant of the law without a default of his own, the presumption is seemingly unreasonable, and demands a short explanation.⁵¹]

Infancy: When a justification. When, and in what degree, an excuse.

Insanity: (in its various modes of idiocy, imbecility, lunacy, partial madness, &c.)

[Drunkenness: Never a justification. When, and in what degree, an excuse.—Ground for imputing the fact to the drunken party, where the drunkenness was not resorted to as a mean of accomplishing or concealing a criminal design.]

Principle 2. An act or omission is not a crime, if it be purely *involuntary*; i.e. if the not doing the act⁵² done, or the doing the act omitted, did not depend anywise on the wishes (or will) of the party.

Justifications deducible from principle 2, viz:

Misfortune. [Mishap, chance, accident, *casus*, *damnum fatale*, etc.]

Compulsion or restraint merely physical: i.e. not applied to the wishes (or will) of the party.

Principle 3. Generally, an act or omission is not a crime, or is more or less excusable, if it proceeded from an instant and well-grounded fear stronger than the fear naturally inspired by the law.

(a) Statement and explanation of principle 3.

(b) Justifications deducible from principle 3.

Fear of harm not impending from the will of man.

Fear of (unlawful) harm impending from the will of man.

E.g. Joining a foreign enemy through fear of instant death. Wife joining in a crime in consequence of threats from husband. [The English Criminal Law in respect of coercion of wife by husband, is seemingly full of inconsistencies.]

⁵¹ See Lecture XXV. *ante*.

⁵² Inasmuch as the party is mentally passive, it cannot be said, with perfect propriety, that he acts.

Note.—Principles 1, 2, and 3, are all of them deducible from the following simple truth. Owing to the plight in which the party was, fear of the punishment could not have acted upon him; or, if fear of the punishment could have acted upon him, it could not, or probably would not, have deterred him from the act or omission. Consequently, the infliction of the punishment on the party could not operate as an example, or could not produce the effect of deterring others from crime.

Principle 4. An act or omission pursuant to a legal duty is not a crime:

E.g. Arrest of a criminal. Execution of a judgment.

Principle 5. An act or omission pursuant to a legal right, or to a permission or licence granted or authorised by the law, is not a crime.

(a) Of self-defence, with its various grounds and limits.

Also, generally, of self-assistance (or of righting one's self without a resort to justice). (*Sed q^{ue}.*)

(b) Of the cases in which the fact concurs with the wishes of the party who is immediately its object.

Where the party acting or omitting is also the immediate object of the act or omission: *E.g.* Suicide.

Where the party acting or omitting is not the immediate object of the act or omission. '*Volenti non fit injuria.*' When the maxim holds. When it does not.

(c) Of the cases in which the party who is the immediate object of the act or omission is 'out of the protection of the law.'

Q^{ue}. Whether there be any such case according to the criminal law now in force?

Principle 6. An *overt* act (or such an act, other than a confession of the party, as indicates his criminal knowledge) is of the essence of a crime by commission; also of a crime by omission accompanied with criminal knowledge.

[An overt act is an act *indicating criminal knowledge*, and is not *any act indicating a foregone crime*. Consequently, it is not of the essence of a crime by omission, where the omission is the effect of negligence. But such a crime by omission may be indicated by an overt act as meaning *any act indicating a foregone crime*.]

Why criminal knowledge without an overt act (or merely disclosed by the confession of the party) is not imputable.

Note.—Perhaps the term ‘*overt act*’ is restricted to such an act as indicates a criminal design; or even to such an act as accomplishes or subserves the design.

Unless the act were a mean to the accomplishment of a criminal design (or were an effect or consequence of a foregone criminal design) it hardly could shew the existence of the requisite ground of imputation: viz. the criminal knowledge of the party. (*Sed q^{ue}.*) For a design may be merely criminal in respect to a probable consequence *not wished by the party*. And, in this case, an act indicating his knowledge of the probable mischievous consequence is not of necessity an act accomplishing or subserving the design.

It would seem that the overt act which is requisite in the case of an *attempt*, is necessarily an act consequent on a criminal design, or serving as a mean or step to the accomplishment of a criminal design. (*Sed q^{ue}.*)

It is held by the Court of Cassation, in cases of an *attempt*, that ‘*overt or exterior act*’ and ‘*commencement of execution*’ are equivalent expressions.—(See Feuerbach and other German Criminalists.)

CHAPTER IV.

Of consummate Crimes, and of Crimes consisting in attempts to commit crimes [or, criminal attempts].

1. Generally, an attempt to commit a crime is of itself a crime. (Exceptions from the rule.)

2. Essentials of a criminal attempt.

No criminal attempt without criminal knowledge.

[Or, No criminal attempt without a criminal design: *i.e.* unless the consummation of a crime be the end or object of the party, or be a mean or step towards his end or object. (*Sed q^{ue}.*) For though a design be innocent independently of a probable mischief *not wished by the party*, his attempt may perhaps be criminal if he be *conscious* of the danger.]

No criminal attempt without an overt act: *i.e.* an act (other than a confession) indicating criminal knowledge.

[Or, No criminal attempt without an overt act: *i.e.* an act which is the natural effect of a foregone criminal design, or which serves as a mean or step to the accomplishment of a criminal design. (*Sed q^{ue}.*)]

3. Grounds for punishing a criminal attempt less severely than the corresponding consummate crime.

[In some cases, the consummation of the crime is not more mischievous than the attempt to commit it. *E.g.* Theft consummated by the merest amotion of the subject from the place which it occupied, is not a whit more mischievous than an abortive attempt to amove it.]

Expediency of leaving to the party a *locus pœnitentiæ*, wherever the consummation of the crime would be more mischievous than the attempt, etc. etc.

[Departures from this principle in the English Criminal law. They are not only inexpedient, but are out of analogy or harmony with the body of the system. Coventry Act, Lord Ellenborough's Act, etc.—Absurdity of the Roman and French Law in this respect.]

4. Distinction between a *remote* or merely incipient attempt [*i.e.* where the acts of the party would not naturally consummate the crime] and a *proximate* or perfect attempt [*i.e.* where the acts of the party would naturally consummate the crime, but the consummation is prevented by the intervention of an extrinsic cause.] (*Q^{ue}*.)

Note.—Case of an *omission* not followed by the probable mischief which renders it criminal; but where the omitting party intended the mischief, or, at least, was conscious of the danger.

Cannot be called an *attempt*: for an attempt imports an act pursuant to a criminal design, or, at least, indicating criminal knowledge.

Is there any case (in the English Criminal Law) in which a party so omitting would be held liable *as for an attempt*?

[*Note.*—Would it be expedient to define generally *Corpus delicti*: *i.e.* the sum (or aggregate) of the properties (or characters) which constitute the essence (or definition) of a crime of a given class? If so, the general definition and explanation would be placed appositely in Chapter III. For the expression '*corpus delicti*,' an equivalent English expression (such, for example, as '*essence of the crime*') might easily be devised.] (See Table II. *post*.)

5. Distinction between criminal attempts in respect of differences between the causes which prevent their consummation.

Where the consummation is prevented by the penitence of the party.

Where the consummation is prevented, not by the penitence of the party, but by the intervention of an extrinsic cause.⁵⁸

⁵⁸ R. v. Taylor 1 F. and F. 5.

6. Incitements to crime. [*Sed q^{ue}*. Would perhaps be placed more appositely in the Chapter on Principals and Accessories.]

CHAPTER V.

Of Principals and Accessories.

[*Q^{ue}*. Can a so-called 'accessory *after the fact*' be deemed an *accessory*: i.e. a person who aided the given crime, and who therefore must have been party to it before its conclusion? Ought not the offence of the so-called Accessory to be placed in a Chapter of the Department relating to Public Crimes?]

CHAPTER VI.

Of Punishments (including those consequences of crimes which are not punishments nominally, but which are punishments in effect).

1. Enumeration and description of the punishments (and other penal consequences) which are annexed to Crimes by the English Criminal Law: (or by the portion of the English Criminal Law which is embraced by the intended Code.)

E.g. Death.

Transportation.

Imprisonment.

Fine, etc.

General Forfeiture.

Corruption of blood (with
Escheat).

Incapacity to give testi-
mony, etc.

Q^{ue}. As to the expediency of these sweeping and indiscriminating punishments.

2. Rules (or Instructions) for the application of Punishments.

(a) Where the nature of the punishment is not determined by the Law; or where the degree of the punishment is indeterminate altogether; or where the degree of the punishment, though not indeterminate altogether, is determined imperfectly or proximately by the assignment of a *maximum* and *minimum*.

Specimens of the various considerations which are grounds for the Rules or Instructions, viz.

Magnitude of the mischief which the crime has a tendency to produce.

Difficulty or ease with which it may usually be committed.

Consummation or Attempt; If attempt, nature of the cause which rendered it abortive.

Criminal Knowledge or Negligence; If negligence, the degree of it.

Motive or inducement to the crime; which, though it commonly is foreign to the question of guilt or innocence, is often a good reason for aggravating or mitigating the punishment.

Disposition of the criminal, as evinced by the fact in question, or by extrinsic testimony to his general character, etc. etc.

(b) In the case of a repetition of the crime.

(c) In the case of concurrent crimes (or, rather, concurrent convictions).

3. Extinction of liability to punishment (or to a criminal action or pursuit).

By sufferance of the punishment.

By Death.

By Prescription, or limitation of time.

By Pardon, etc. etc.

THE PARTICULAR PART OF THE CRIMINAL CODE. (1.)

Private Crimes ; i.e.

Crimes by private persons (i.e. merely private persons, or public persons in private characters), which affect directly and specially the rights of private persons (i.e. merely private persons, or public persons in private characters).

Crimes which affect directly and specially the State or Sovereign Government : i.e. the entire state, or any of its constituent and necessary parts.

Crimes of which the purpose is the *subversion* of the State ; or which tend to such subversion (although it be not their purpose), by necessary or probable consequence.
[High Treason, *Perduel-lio.*]

Crimes short of High Treason. [*Crimina lææ Majestatis.*]

Crimes affecting directly and specially public or political persons in their public or political characters ; with crimes by such persons in the same characters.

Crimes which affect directly and specially the rights or powers of subordinate public persons.

Crimes by subordinates public persons in their public characters.

A classification of the departments into which the subordinate government of the country is most commodiously divisible ; (or, a classification of the persons who may be deemed political subordinates ; with the crimes by and against the various individuals and bodies who are members of those departments respectively.)

Public Crimes.

Crimes not affecting (or not affecting directly and specially) any determinate person, public or private. Crimes against the public (or community), as considered generally and indeterminate. [Subjects of *Police Law* in one of the senses of the term.]

E.g.

Usury :—Forestalling, regrating ; obtaining an unlawful monopoly :—Combinations amongst workmen or masters :—Gambling :—Setting up bubbles, etc.

Offences against the public peace. Going unlawfully armed :—Common affrays :—Libel (as considered by the English Criminal Law), etc.

Common Nuisances.

Breach of Quarantine : selling unwholesome provisions : etc.

Offences against Religion (not amounting to offences against ministers of religion, or against religious societies).

Offences *contra bonos mores*. Self-regarding offences ; such as suicide, etc.

CODE (OR LAW) OF CRIMINAL PROCEDURE AND PREVENTIVE POLICE.⁶⁴

Criminal Procedure.

[Search for and pursuit of crimes already committed.

End, prevention of crimes through the infliction of punishment on past crimes.]

1. Ordinary and Extraordinary Tribunals, with their respective competence, and jurisdiction.

2. Ordinary Procedure.

Up to accusation (by indictment or information).
[*Police judiciaire.*]

After accusation.
[*La justice.*]

3. Extraordinary modes of Procedure [marking only the anomalies; and referring, for the general rules, to the ordinary Procedure].

Preventive Police.

[End, prevention of crimes, but not through the infliction of punishment. Embracing such means of preventing crimes as are not comprised in criminal process.]

Rules for regulation of prisons (penal, or prisons of detention), of transport vessels, etc. [*Que.*]

Generalia.

Distinction between civil and criminal actions.

Where they concur.

Where the one excludes the other.

Where they are pursuable jointly.

Where they are pursuable separately.

Rules of evidence peculiar to criminal cases.

⁶⁴ Different meanings of the word Police :—

1. Preventive Police.—2. Laws which prevent mediately.—3. Laws administered by inferior tribunals.—4. Laws which impose duties, regarding the community generally. A mixture of all these.

TABLE I.

(1) *Culpa, sensu lato.*

Equivalent to the English *Cruelty*; and therefore comprising all the elements which constitute the *Corpus* (or essence) of the given delict (or crime).

(2) *Culpa, sensu medio.*

Comprising criminal intention; criminal knowledge short of criminal intention, or negligence. [Which three, together with dependence on wishes of party of the forbearance or performance due, are sometimes called emphatically 'the grounds of imputation.']

All the constituents of the given *Corpus delicti*, excepting criminal intention, criminal knowledge short of criminal intention, or negligence. [Sometimes deemed the *Corpus delicti*; being the difference, though not the whole essence, of the given crime.]

(a) *Dolus (in specie)*: i.e. criminal intention consummated or attempted by fraud: *dolus with simulatio.*

(b) *Dolus (in genere)*. Equivalent to criminal intention: [*Scientia*, with the *voluntas nocendi*.]

(3) *Culpa, sensu stricto.*

Criminal knowledge short of Criminal Intention: [*Scientia*, but without the *voluntas nocendi*: *Prope dolum*, but not *dolus*.]

Negligence.

Criminal knowledge *in genere*.

Non faciendo.

In faciendo.

Heedlessness.

Imprudence: a mode of which is Temerity.

Note.—Generally, an act, forbearance, or omission, which is merely culpable (or not dolose), is not a crime or public delict: i.e. the possible ground of a criminal or public action. It is merely a civil or private injury, or is merely the possible ground of a civil or private action. Hence, probably, the frequency of the assumption that criminal intention is of the essence of a crime.

TABLE II.

Criminal Knowledge (or Consciousness) In regard to a *present* act or forbearance, or to a necessary or probable mischief consequent on such act or forbearance.

| | | | | | |
|--|---|--|---|--|--|
| In regard to the act or forbearance ; which is always intended : i.e. known and wished (as an end or a mean). But which may be | In regard to the necessary or probable mischief. | Non faciendo ; Omission. | In faciendo. | | |
| Criminal per se, or independently of a mischief necessarily or probably consequent upon it. [Necessarily accompanied by a criminal intention.] | Criminal not per se but by reason of a mischief necessarily, etc. [Not necessarily accompanied by a criminal intention.] | Criminal intention : i.e. knowledge or necessity or probability of the mischief, and wish of the mischief (as an end or a mean). | Criminal Knowledge short of criminal intention : i.e. knowledge of necessity or probability of the mischief, but without a wish of the mischief ; the mischief not being an end of act or forbearance, nor subservient to the end. [Called erroneously, 'oblique intention,' or dolus indirectus.] | Heedlessness : or inattention to necessity or probability of the mischief. | Advertence to necessity, etc. ; false supposition of a preventive ; and inattention to the grounds of supposition. |
| | | | | Imprudence : where the inattention is not gross. | Temerity : where the inattention is gross. |
| Premeditated. | Unpremeditated. | Criminal Intention. | | | |
| | Determinate, in respect of mischief intended. | Indeterminate, in respect of, etc. | | | |
| In case of future act presently intended, mischievous consequences may be intended ; or may be merely known : and if merely known, may be known as consequence of criminal or innocent intention. Intention may be determinate or indeterminate in regard to means, as well as to mischief. | | | | | |

TABLE III.

| (Division, p. 201-294. | | Remarks on the grounds of the division, p. 295. | |
|---|--|--|--|
| I. Private Crimes. | | Public Crimes. | |
| [pp. 203, 4, 5, 240.] | | [203-4] | |
| 1. Against Person. [241] 2. Against Reputation. [244] 3. Against Property. [245] 4. Against person and reputation. [251] 5. Against person and Property. [252] | | 6. Against Condition. [253] 7. Against the Public or Community, as considered generally and indeminately. | |
| Forgets breaches of contract and quasi-contract; unless every obligation is to be deemed a condition (p. 207); or unless every obligation is included in property; or unless every breach of an obligation is included in Crimes against Trust. | | Against the Sovereign. [9] Against political subordinates. | |
| IV. Against and by public persons in their public characters. [210-283] | | Against the Public or Community, as considered generally and indeminately. | |
| Against the Sovereign. [9] | | Extra-regarding. | |
| Against Justice. (2.) Against External security. (1.) | | III. Self-regarding [209-244, et post, passim]. | |
| Against Justice. (2.) Against External security. (1.) | | IV. Public [210-283]. | |
| Against Justice. (2.) Against External security. (1.) | | II. Semi-Public [208-243, et post, passim]. | |
| Against Justice. (2.) Against External security. (1.) | | Against the Population. (7.) Against National Wealth. (8.) Against Religion. (10.) | |
| Against Justice. (2.) Against External security. (1.) | | Against the National Interests in general (11.) | |

All the figures in this Table refer to Bentham's *Principles of Morals and Legislation*, 4th Edition 1789.—S. A.

Characters of the Five Classes of Crimes, p. 300.)

V. Crimes by Falsehood.

Crimes against (or by breach of) Trust.* [See pp. 204-206, 218.]

[A similar class (either complete, or forming a negative member of a higher or larger class) might be built on any of the means (being of the essence of the crime) through which any crime is consummated or attempted. E.g. *via*, conspiracy, effraction, etc.]

* Feuerbach, p. 323. Rosshirt, p. 198.

ON THE USES OF THE STUDY OF JURISPRUDENCE.

THE matter of the following Essay is chiefly taken from the Opening Lectures of the two several Courses delivered by Mr. Austin at the London University and at the Inner Temple. The first ten lectures of the former and longer Course were published (greatly altered and expanded) by the Author, in a volume bearing the title of 'The Province of Jurisprudence Determined;' which has been republished since his death. The form and character which he gave to that work rendered an Introductory Lecture superfluous and inappropriate. It was consequently omitted; nor was there any use or place assigned to it.

It is evident that a discourse of the kind could not, with any fitness, be prefixed to the subsequent Lectures of that Course, as now published.

The Second Opening Lecture was likewise necessarily excluded by the Author's arrangement; according to which the lectures delivered at the Inner Temple were (as I have said elsewhere) incorporated with the previous and longer Course. Like the former, this therefore remained without any designated place.

Such however, I knew, was Mr. Austin's sense of the importance of the study of Jurisprudence, that if he had completed any work containing the full expression of his opinions, all that is here gathered together (and probably much more) would doubtless have been urged in favour of its cultivation. I have therefore thought it right to preserve and to consolidate whatever was of permanent value in these two Introductory Lectures, and have incorporated with them some fragments on the subject of which they treat. In this instance, and in this alone, I have presumed to make some slight changes in the form of what he wrote; I have united the two discourses, the subject and purport of which is the same, into one continuous Essay; omitting inevitable repetitions and supplying a few links from other sources.

The table at the end does not belong to either Lecture, nor to any part of the matter above described. I found it among loose scraps, with no mark or reference as to its destination. Perhaps it belonged to a few notes relating to the work 'On the Principles and Relations of Jurisprudence and Ethics,' which he meditated.⁵⁵ As it gives a brief but comprehensive view of his Idea of the course of study necessary to the forming of an accomplished Lawyer or Statesman, it seemed to find its place with this Essay—S. A.

⁵⁵ See Vol. I. preface, p. 16, *ante*.

Proper
subject of
Jurispru-
ence.

THE appropriate subject of Jurisprudence, in any of its different departments, is positive law: Meaning by positive law (or law emphatically so called), law established or 'positum,' in an independent political community, by the express or tacit authority of its sovereign or supreme government.

Considered as a whole, and as implicated or connected with one another, the positive laws and rules of a particular or specified community, are a system or body of law. And as limited to any one of such systems, or to any of its component parts, jurisprudence is particular or national.

Though every system of law has its specific and characteristic differences, there are principles, notions, and distinctions common to various systems, and forming analogies or likenesses by which such systems are allied.

Many of these common principles are common to all systems; —to the scanty and crude systems of rude societies, and the ampler and maturer systems of refined communities. But the ampler and maturer systems of refined communities are allied by the numerous analogies which obtain between all systems, and also by numerous analogies which obtain exclusively between themselves. Accordingly, the various principles common to maturer systems (or the various analogies obtaining between them), are the subject of an extensive science: which science (as contradistinguished to national or particular jurisprudence on one side, and, on another, to the science of legislation) has been named General (or comparative) Jurisprudence, or the philosophy (or general principles) of positive law.

As principles abstracted from positive systems are the subject of general jurisprudence, so is the exposition of such principles its exclusive or appropriate object. With the goodness or badness of laws, as tried by the test of utility (or by any of the various tests which divide the opinions of mankind), it has no immediate concern. If, in regard to some of the principles which form its appropriate subject, it adverts to considerations of utility, it adverts to such considerations for the purpose of explaining such principles, and not for the purpose of determining their worth. And this distinguishes the science in question from the science of legislation: which affects to determine the test or standard (together with the principles subordinate or consonant to such test) by which positive law ought to be made, or to which positive law ought to be adjusted.

If the possibility of such a science appear doubtful, it arises from this; that in each particular system, the principles and

distinctions which it has in common with others, are complicated with its individual peculiarities, and are expressed in a technical language peculiar to itself.

It is not meant to be affirmed that these principles and distinctions are conceived with equal exactness and adequacy in every particular system. In this respect different systems differ. But, in all, they are to be found more or less nearly conceived; from the rude conceptions of barbarians, to the exact conceptions of the Roman lawyers or of enlightened modern jurists.⁵⁶

I mean, then, by General Jurisprudence, the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law; understanding by systems of law, the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction.

Of the principles, notions, and distinctions which are the subjects of general jurisprudence, some may be esteemed necessary. For we cannot imagine coherently a system of law (or a system of law as evolved in a refined community), without conceiving them as constituent parts of it.

Of these necessary principles, notions, and distinctions, I will suggest briefly a few examples.

1°. The notions of Duty, Right, Liberty, Injury, Punishment, Redress; with their various relations to one another, and to Law, Sovereignty, and Independent Political Society:

2°. The distinction between written or promulged, and unwritten or unpromulged law, in the juridical or improper senses attributed to the opposed expressions; in other words, between law proceeding immediately from a sovereign or supreme maker, and law proceeding immediately from a subject or subordinate maker (with the authority of a sovereign or supreme):

⁵⁶ Universal Jurisprudence is the science of the *Jus Gentium* of the Roman Lawyers, as expounded by Gaius.

Mr. Bentham is of opinion that it must be confined within very narrow bounds. This is true, if by expository Universal Jurisprudence he intended, Jurisprudence expository of that which obtains universally as Law.

For (1°) Assuming that the systems of all nations, wholly or in part, exactly resembled each other (i.e. that all or many of the provisions to be found in those several systems were exactly alike), still we could not speak of them with propriety as forming a Universal Law; the sanction being applied by the government of each community, and not by a

superior common to all mankind. And this (as we shall see hereafter) ranks international law with morals rather than with law.

(2°) As is observed by Mr. Bentham, the provisions of different systems are never precisely alike; the only parts in which they agree exactly, being those leading expressions which denote the necessary parts of every system of law. *E.g.* The Rights of husbands, wives, etc.; the law relating to easements here and *servitudes* in France, resemble or are analogous; but are still not precisely alike either in matter or form, and therefore cannot be described by the same form of words.

3°. The distinction of Rights, into rights availing against the world at large (as, for example, property or dominion), and rights availing exclusively against persons specifically determined (as, for example, rights from contracts) :

4°. The distinction of rights availing against the world at large, into property or dominion, and the variously restricted rights which are carved out of property or dominion :

5°. The distinction of Obligations (or of duties corresponding to rights against persons specifically determined) into obligations which arise from contracts, obligations which arise from injuries, and obligations which arise from incidents that are neither contracts nor injuries, but which are styled analogically obligations 'quasi ex contractu.'

6°. The distinction of Injuries or Delicts, into civil injuries (or private delicts) and crimes (or public delicts); with the distinction of civil injuries (or private delicts) into torts, or delicts (in the strict acceptation of the term), and breaches of obligations from contracts, or of obligations 'quasi ex contractu.'

It will, I believe, be found, on a little examination and reflection, that every system of law (or every system of law evolved in a refined community) implies the notions and distinctions which I now have cited as examples; together with a multitude of conclusions imported by those notions and distinctions, and drawn from them, by the builders of the system, through inferences nearly inevitable.

Of the principles, notions, and distinctions which are the subjects of General Jurisprudence, others are not necessary (in the sense which I have given to the expression). We may imagine coherently an expanded system of law, without conceiving them as constituent parts of it. But as they rest upon grounds of utility which extend through all communities, and which are palpable or obvious in all refined communities, they in fact occur very generally in matured systems of law; and therefore may be ranked properly with the general principles which are the subjects of general jurisprudence.

Such, for example, is the distinction of law into 'jus personarum' and 'jus rerum': the principle of the scientific arrangement given to the Roman Law by the authors of the elementary or institutional treatises from which Justinian's Institutes were copied and compiled. The distinction, I believe, is an arbitrarily assumed basis for a scientific arrangement of a body of law. But being a commodious basis for an arrangement of a body of law, it has been very generally adopted by those

who have attempted such arrangements in the modern European nations. It has been very generally adopted by the compilers of the authoritative Codes which obtain in some of those nations, and by private authors of expository treatises on entire bodies of law. Nay, some who have mistaken the import of it, and who have contemptuously rejected it, as denoted by the obscure antithesis of 'jus personarum et rerum,' have yet assumed it under other (and certainly more appropriate) names, as the basis of a natural arrangement. Meaning, I presume, by a natural arrangement, an arrangement so commodious, and so highly and obviously commodious, that any judicious methodiser of a body of law would naturally (or of course) adopt it.

But it will be impossible, or useless, to attempt an exposition of these principles, notions and distinctions, until by careful analysis, we have accurately determined the meaning of certain leading terms which we must necessarily employ; terms which recur incessantly in every department of the science: which, whithersoever we turn ourselves, we are sure to encounter. Such, for instance, are the following: Law, Right, Obligation, Injury, Sanction: Person, Thing, Act, Forbearance. Unless the import of these are determined at the outset, the subsequent speculations will be a tissue of uncertain talk.

It is not unusual with writers who call and think themselves '*institutional*' to take for granted, that they know the meaning of these terms, and that the meaning must be known by those to whom they address themselves. Misled by a fallacious test, they fancy that the meaning is simple and certain, because the expressions are familiar. Not pausing to ask their import, not suspecting that their import can need inquiry, they cast them before the reader without an attempt at explanation, and then proceed (without ceremony) to talk about them.

These terms, nevertheless, are beset with numerous ambiguities: their meaning, instead of being simple, is extremely complex: and every discourse which embraces Law as a whole, should point distinctly at those ambiguities, and should sever that complex meaning into the simpler notions which compose it.

Many of those who have written upon Law, have defined these expressions. But most of their definitions are so constructed that, instead of shedding light upon the thing defined, they involve it in thicker obscurity. In most attempts to define the terms in question, there is all the pedantry without the reality of logic: the form and husk, without the substance. The pretended definitions are purely circular: turning upon the very

expressions which they affect to elucidate, or upon expressions which are exactly equivalent.

In truth, some of these terms will not admit of definition in the formal or regular manner. And as to the rest, to define them in that manner is utterly useless. For the terms which enter into the abridged and concise definition, need as much elucidation as the very expression which is defined.

The import of the terms in question is extremely complex. They are short marks for long series of propositions. And, what aggravates the difficulty of explaining their meaning clearly, is the intimate and indissoluble connection which subsists between them. To state the signification of each, and to shew the relation in which it stands to the others, is not a thing to be accomplished by short and disjointed definitions, but demands a dissertation, long, intricate and coherent.

For example: Of Laws or Rules there are various classes. Now these classes ought to be carefully distinguished. For the confusion of them under a common name, and the consequent tendency to confound Law and Morals, is one most prolific source of jargon darkness and perplexity. By a careful analysis of leading terms, law is detached from morals, and the attention of the student of jurisprudence is confined to the distinctions and divisions which relate to law exclusively.

But in order to distinguish the various classes of laws, it is necessary to proceed thus:—To exhibit, first, the resemblance between them, and, then, their specific differences: to state *why* they are ranked under a common expression, and then to explain the marks *by which* they are distinguished. Till this is accomplished, the appropriate subject of Jurisprudence is not discernible precisely. It does not stand out. It is not sufficiently detached from the resembling or analogous objects with which it is liable to be confounded.

Thus, for example, in order to establish the distinction between Written and Unwritten Law, we must scrutinise the nature of the latter: a question which is full of difficulty; and which has hardly been examined with the requisite exactness by most of the writers who have turned their attention to the subject. I find it much vituperated, and I find it as much extolled; but I scarcely find an endeavour to determine *what it is*. But if this humbler object were well investigated, most of the controversy about its merits would probably subside.

To compare generally, or in the abstract, the merits of the two species, would be found useless: and the expediency of the

process which has been styled Codification, would resolve itself into a question of time, place, and circumstance.

The word Jurisprudence itself is not free from ambiguity ; it has been used to denote—

The knowledge of Law as a science, combined with the art or practical habit or skill of applying it ; or, secondly,

Legislation ;—the science of what *ought to be done* towards making good laws, combined with the art of doing it.

Inasmuch as the knowledge of what ought to be, supposes a knowledge of what is, legislation supposes jurisprudence, but jurisprudence does not suppose legislation. What laws have been and are, may be known without a knowledge of what they ought to be. Inasmuch as a knowledge of what ought to be, is bottomed on a knowledge of antecedents *cognato genere*, legislation supposes jurisprudence.

With us, Jurisprudence is the science of what is essential to law, combined with the science of what it ought to be.⁵⁷ It is particular or universal. Particular Jurisprudence is the science of any actual system of law, or of any portion of it. The only practical jurisprudence is particular.

The proper subject of General or Universal Jurisprudence (as distinguished from Universal Legislation) is a description of such subjects and ends of Law as are common to all systems ; and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in their several positions.

And these resemblances will be found to be very close, and to cover a large part of the field. They are necessarily confined to the resemblances between the systems of a few nations ; since it is only a few systems with which it is possible to become acquainted, even imperfectly. From these, however, the rest may be presumed. And it is only the systems of two or three nations which deserve attention :—the writings of the Roman Jurists ; the decisions of English Judges in modern times ; the provisions of French and Prussian Codes as to arrangement. Though the points are also few in which the laws of nations ought to be the same (*i.e.* precisely alike), yet there is much room for universal legislation : *i.e.* the circumstances not precisely alike may be treated of together, in respect of what they have in common ; with remarks directed to their differences. Whether the principles unfolded deserve the name of Universal or not, is

⁵⁷ For its meaning in the sense of the French, see Blondeau, Dupin, and others.

of no importance. Jurisprudence may be universal with respect to its subjects: Not less so than legislation.

Inevitable
(and some-
times in-
tentional)
implica-
tion of
Legisla-
tion with
Jurispru-
dence.

It is impossible to consider Jurisprudence quite apart from Legislation; since the inducements or considerations of expediency which lead to the establishment of laws, must be adverted to in explaining their origin and mechanism. If the causes of laws and of the rights and obligations which they create be not assigned, the laws themselves are unintelligible.

Where the subject is the same, but the provisions of different systems with respect to that subject are different, it is necessary to assign the causes of the difference: whether they consist in a necessary diversity of circumstances, or in a diversity of views on the part of their respective authors with reference to the *ends* of Law. Thus, the rejection or limited reception of entails in one system, and their extensive reception in another, are partly owing to the different circumstances in which the communities are placed;—partly to the different views of the aristocratic and democratic legislators by whom these provisions have been severally made.

So far as these differences are inevitable—are imposed upon different countries—there can be no room for praise or blame. Where they are the effect of choice, there is room for praise or blame; but I shall treat them not as subjects of either, but as *causes* explaining the existence of the differences. So of the admission or prohibition of divorce—Marriages within certain degrees, etc.

Wherever an opinion is pronounced upon the merits and demerits of Law, an impartial statement of the conflicting opinions should be given. The teacher of Jurisprudence may have, and probably has, decided opinions of his own; but it may be questioned whether earnestness be less favourable to impartiality than indifference; and he ought not to attempt to insinuate his opinion of merit and demerit under pretence of assigning causes. In certain cases which do not try the passions (as rescission of contract for inadequacy of consideration) he may, with advantage, offer opinions upon merits and demerits. These occasional excursions into the territory of Legislation, may serve to give a specimen of the manner in which such questions should be treated. This particularly applies to Codification: a question which may be agitated with safety, because everybody must admit that Law ought to be known, whatever he may think of the provisions of which it ought to consist.

Attempting to expound the principles which are the subject of the science of Jurisprudence (or rather to expound as many of them as a limited Course of Lectures will embrace), he must not only try to state them in general or abstract expressions, but must also endeavour to illustrate them by examples from particular systems: especially by examples from the Law of England, and from the Roman or Civil Law.

For the following sufficient reason (to which many others might be added), the Roman or Civil Law is, of all particular systems, other than the Law of England, the best of the sources from which such illustrations might be drawn.

Value of
the Study
of Roman
Law.

In some of the nations of modern Continental Europe (as, for example, in France), the actual system of law is mainly of Roman descent; and in others of the same nations (as, for example, in the States of Germany), the actual system of law, though not descended from the Roman, has been closely assimilated to the Roman by large importations from it.

Accordingly, in most of the nations of modern Continental Europe, much of the substance of the actual system, and much of the technical language in which it is clothed, is derived from the Roman Law, and without some knowledge of the Roman Law the technical language is unintelligible; whilst the order or arrangement commonly given to the system, imitates the exemplar of a scientific arrangement which is presented by the Institutes of Justinian. Even in our own country, a large portion of the Ecclesiastical and Equity, and some (though a smaller) portion of the Common Law, is derived immediately from the Roman Law, or from the Roman through the Canon.

Nor has the influence of the Roman Law been limited to the positive law of the modern European nations. For the technical language of this all-reaching system has deeply tintured the language of the international law or morality which those nations affect to observe. By drawing, then, largely for examples on the Roman or Civil Law, an expositor of General Jurisprudence (whilst illustrating his appropriate subject) might present an idea of a system which is a key to the international morality, the diplomacy, and to much of the positive law, of modern civilised communities.

It is much to be regretted that the study of the Roman Law is neglected in this country, and that the real merits of its founders and expositors are so little understood.

Much has been talked of the philosophy of the Roman

Institutional writers. Of familiarity with Grecian philosophy there are few traces in their writings, and the little that they have borrowed from that source is the veriest foolishness: for example, their account of *Jus naturale*, in which they confound law with animal instincts; law, with all those wants and necessities of mankind which are causes of its institution.

Nor is the Roman law to be resorted to as a magazine of legislative wisdom. The great Roman Lawyers are, in truth, expositors of a positive or technical system. Not Lord Coke himself is more purely technical. Their real merits lie in their thorough mastery of that system; in their command of its principles; in the readiness with which they recall, and the facility and certainty with which they apply them.

In support of my own opinion of these great writers I shall quote the authority of two of the most eminent Jurists of modern times.

‘The permanent value of the *Corpus Juris Civilis*,’ says Falck, ‘does not lie in the Decrees of the Emperors, but in the remains of juristical literature which have been preserved in the Pandects. Nor is it so much the matter of these juristical writings, as the scientific method employed by the authors in explicating the notions and maxims with which they have to deal, that has rendered them models to all succeeding ages, and pre-eminently fitted them to produce and to develop those qualities of the mind which are requisite to form a Jurist.’⁵⁸

And Savigny says, ‘It has been shewn above, that, in our science, all results depend on the possession of leading principles; and it is exactly this possession upon which the greatness of the Roman Jurists rests. The notions and maxims of their science do not appear to them to be the creatures of their own will; they are actual beings, with whose existence and genealogy they have become familiar from long and intimate intercourse. Hence their whole method of proceeding has a certainty which is found nowhere else except in mathematics; and it may be said without exaggeration, that they calculate with their ideas. If they have a case to decide, they begin by acquiring the most vivid and distinct perception of it, and we see before our eyes the rise and progress of the whole affair, and all the changes it undergoes. It is as if this particular case were the germ whence the whole science was to be developed. Hence, with them, theory and practice are not in fact distinct; their theory is so thoroughly worked out as to be fit for immediate application, and their

⁵⁸ Jurist. Encyc. cap. ii. § 109.

practice is uniformly ennobled by scientific treatment. In every principle they see a case to which it may be applied; in every case, the rule by which it is determined; and, in the facility with which they pass from the general to the particular and the particular to the general, their mastery is indisputable.⁵⁹

In consequence of this mastery of principles, of their perfect consistency ('*elegantia*'⁶⁰), and of the clearness of the method in which they are arranged, there is no positive system of law which it is so easy to seize as a whole. The smallness of its volume tends to the same end.

The principles themselves, many of them being derived from barbarous ages, are indeed ill fitted to the ends of law; and the conclusions at which they arrive being logical consequences of their imperfect principles, necessarily partake of the same defect.⁶¹

A subordinate merit of the Roman lawyers is their style, always simple and clear, commonly brief and nervous, and entirely free from *nitor*. Its merits are appropriate and in perfect taste. It bears the same relation to that of Blackstone and Gravina, which a Grecian statue bears to a milliner's doll in the finery of the season.

I by no means mean to put the study of the Roman Law on a level in point of importance with that of the Aristotelic Logic (for the Roman Law is not *necessary*): but in the respect now under consideration, it bears the same relation to law and morals, which the school logic bears to philosophy.

The number of the analogies between the Roman Law and many of the Continental systems, and between the Roman and English Law, is not indeed to be wondered at: since those Continental systems and also our own system of Equity, have been formed more or less extensively on the Roman Law; chiefly on the Roman, through the Canon. But the English Law, like the Roman, is, for the most part, indigenous, or comparatively little has been imported into it from the Roman. The coincidences shew how numerous are the principles and distinctions which all systems of law have in common. The extensive coincidence of particular systems may be ascertained practically by comparing two expositions of any two bodies of law. The coincidence is pre-eminently remarkable in the Roman Law and the Common Law of England.

⁵⁹ *Vom Beruf*, etc. cap. iv. p. 30.

⁶⁰ For this application of the word '*elegantia*,' see p. 535, *ante*.

⁶¹ 'Quanuqam non ideo conclusiones

semper probem, quæ sæpe ducuntur ex quibusdam veteris persuasionis apicibus opinione consecratis.'—Leibnitz, *Epist. ad Kestnerum*.

Uses of the
Study of
Jurispru-
dence.

Having stated generally the nature of the science of Jurisprudence, and also the manner in which I think it ought to be expounded, I proceed to indicate briefly a few of its possible uses.

I would remark, in the first place, that a well-grounded study of the principles which form the subject of the science, would be an advantageous preparative for the study of English Law.

To the student who begins the study of the English Law, without some previous knowledge of the *rationale* of law in general, it naturally appears an assemblage of arbitrary and unconnected rules. But if he approached it with a well-grounded knowledge of the general principles of jurisprudence, and with the map of a body of law distinctly impressed upon his mind, he might obtain a clear conception of it (as a system or organic whole) with comparative ease and rapidity.

With comparative ease and rapidity, he might perceive the various relations of its various parts; the dependence of its minuter rules on its general principles; and the subordination of such of these principles as are less general or extensive, to such of them as are more general, and run through the whole of its structure.

In short, the preliminary study of the general principles of jurisprudence, and the mental habits which the study of them tends to engender, would enable him to acquire the principles of English jurisprudence, in particular, far more speedily and accurately than he possibly could have acquired them, in case he had begun the study of them without the preparative discipline.

There is (I believe) a not unprevailing opinion, that the study of the science whose uses I am endeavouring to demonstrate, might tend to disqualify the student for the *practice* of the law, or to inspire him with an aversion from the practice of it. That some who have studied this science have shewn themselves incapable of practice, or that some who have studied this science have conceived a disgust of practice, is not improbably a fact. But in spite of this seeming experience in favour of the opinion in question, I deny that the study itself has the tendency which the opinion imputes to it.

A well-grounded knowledge of the general principles of jurisprudence helps, as I have said, to a well-grounded knowledge of the principles of English jurisprudence; and a previous well-grounded knowledge of the principles of English jurisprudence, can scarcely incapacitate the student for the acquisition of practical knowledge in the chambers of a conveyancer, pleader,

or draftsman. Armed with that previous knowledge, he seizes the *rationale* of the practice which he there witnesses and partakes in, with comparative ease and rapidity; and his acquisition of practical knowledge, and practical dexterity and readiness, is much less irksome than it would be in case it were merely empirical. Insomuch, that the study of the general principles of jurisprudence, instead of having any of the tendency which the opinion in question imputes to it, has a tendency (by ultimate consequence) to qualify for practice, and to lessen the natural repugnance with which it is regarded by beginners.

The advantage of the study of common principles and distinctions, and of history considered as a preparative for the study of one's own particular system, is fully appreciated in Prussia: a country whose administrators, for practical skill, are at least on a level with those of any country in Europe.

System
adopted in
Prussia.

In the Prussian Universities, little or no attention is given by the Law Faculty to the actual law of the country. Their studies are wholly or almost entirely confined to the general principles of Law; to the Roman, Canon, and Feudal law, as the sources of the actual system: the Government trusting that those who are acquainted with such general principles and with the historical basis of the actual system, will acquire that actual system more readily, as well as more groundedly, than if they had at once set down to the study of it, or tried to acquire it empirically.

'In the Prussian states,' says Savigny, 'ever since the establishment of the Landrecht, no order of study has ever been prescribed; and this freedom from restraint, sanctioned by the former experience of the German universities, has never been infringed upon. Even the number of professors, formerly required on account of the Common Law (*Gemeines Recht*), has not been reduced, and the curators of the universities have never led either the professors or the students to believe, that a part of the lectures, formerly necessary, were likely to be dispensed with. Originally it was thought advisable that, in each university, one chair at least should be set apart for the Prussian law, and a considerable prize was offered for the best manual. But even this was subsequently no longer required; and, up to the present time, the Prussian law has not been taught at the university of Berlin. The established examinations are formed upon the same principle; the first, on the entrance into real matters of business, turning exclusively on the common law; the next period is set apart for the directly-practical education

of the jurisconsults; and the two following examinations are the first that have the Landrecht for their subject-matter; at the same time, however, without excluding the common law. At present, therefore, juridical education is considered to consist of two halves; the first half (the university) including only the learned groundwork; the second, on the other hand, having for its object the knowledge of the Landrecht, the knowledge of the Prussian procedure, and practical skill.⁶²

The opinion I have expressed was that of Hale, Mansfield,⁶³ and others (as evinced by their practice) and was recommended by Sir William Blackstone, some eighty years ago.⁶⁴

Backed by such authority, I think I may conclude that the science in question, if taught and studied skilfully and effectually, and with the requisite detail, would be no inconsiderable help to the acquisition of English law.

I may also urge the utility of acquiring the talent of seizing or divining readily the principles and provisions (through the mist of a strange phraseology) of other systems of law, were it only in a mere practical point of view:

1°. With a view to practice, or to the administration of justice in those of our foreign dependencies wherein foreign systems of law more or less obtain. 2°. With a view to the systems of law founded on the Roman directly, or through the Canon or the Roman, which even at home have an application to certain classes of objects. 3°. With a view to questions arising incidentally, even in the Courts which administer indigenous law. 4°. With a view to the questions in the way of appeal coming before the Privy Council: A Court which is bound to decide questions arising out of numerous systems, without the possibility of judges or advocates having any specific knowledge of them: an evil for which a familiarity with the general principles of law on the part of the Court and advocates is the only conceivable palliative.

For, certainly, a man familiar with such principles, as detached from any particular systems, and accustomed to seize analogies, will be less puzzled with Mahomedan or Hindoo institutions than if he knew them only *in concreto*, as they are

⁶² Savigny *Vom Beruf*, etc. Hayward's translation, p. 165.

⁶³ 'Lord Hale often said, the true grounds and reasons of law were so well delivered in the (Roman) Digests, that a man could never understand law as a science so well as by seeking it there, and therefore lamented much that it was

so little studied in England.'—Barnet's *Life*, p. 7.

⁶⁴ Blackstone recommends the study of the Law of Nature, and of the Roman Law, in connection with the study of the particular grounds of our own. By Law of Nature, etc., he seems to mean the very study which I am now commending.

in his own system : nor would he be quite so inclined to bend every Hindoo institution to the model of his own.

And (secondly) without some familiarity with foreign systems, no lawyer can or will appreciate accurately the defects or merits of his own.

And as a well-grounded knowledge of the science whose uses I am endeavouring to demonstrate, would facilitate to the student the acquisition of the English law, so would it enable him to apprehend, with comparative ease and rapidity, almost any of the foreign systems to which he might direct his attention. So numerous, as I have said, are the principles common to systems of law, that a lawyer who has mastered the law which obtains in his own country, has mastered implicitly most of the substance of the law which obtains in any other community. So that the difficulty with which a lawyer, versed in the law of his own country, apprehends the law of another, is rather the result of differences between the terms of the systems, than of substantial or real differences between their maxims and rules.

Now the obstacle to the apprehension of foreign systems which is opposed by their technical language, might in part be obviated or lightened to the student of General Jurisprudence, if the science were expounded to him competently, in the method which I shall endeavour to observe. If the exposition of the science were made agreeably to that method, it would explain incidentally the leading terms, as well as the leading principles, of the Roman or Civil Law. And if the student were possessed of those terms, and were also grounded thoroughly in the law of his own country, he would master with little difficulty the substance of the Roman system, and of any of the modern systems which are mainly derivatives from the Roman.

It has, I perceive, been maintained by some able and distinguished persons, that the jurisdiction of the Ecclesiastical Courts ought to be extended, in order that the ecclesiastical bar may not be extinguished, and that a sufficient supply of Civilians may be secured to the country.

The importance of securing the existence of a body of lawyers, with a somewhat extensive knowledge of the Civil Law, is not to be disputed. Questions arise incidentally in all our tribunals, on systems of foreign law, which are mainly founded on the Civil. The law obtaining in some of our colonies is principally derived from the same original. And questions arising directly out of colonial law, are brought before the Privy Council in the way of appeal. In order that these [various

questions may be justly decided, and in order that the law of these colonies may be duly administered, the existence of a body of English lawyers, with a somewhat extensive knowledge of the Civil Law, is manifestly requisite.

But I think it will be questioned by all who are versed in the Civil Law, whether a well-grounded study of the principles of the Law of England, of the *rationale* of law in general, and of the leading principles and terms of the Roman system itself, be not a surer road to the acquisition of this knowledge, than the study of Ecclesiastical Law, or practice at the ecclesiastical bar.

Before I proceed further, it will be proper that I should describe what is, in my opinion, the education necessary to form a Lawyer.

Training
of a
Lawyer.

In order to the formation of a theoretico-practical lawyer, extensively versed in law as a science, and in the sciences related to law—such a man as were alone capable of advancing the science, and of conceiving sound legislative reforms—he must begin early to attend to these studies, and must be satisfied with a limited attention to other sciences.

The languages of classical antiquity are almost indispensable helps to all sound acquirements in Politics, Jurisprudence, or any of the Moral Sciences. They are also requisite for the formation of those elevated sentiments, and that rectitude of judgment and taste, which are inseparably connected with them. These languages may be acquired, and in fact are acquired, when well acquired, in early youth.

But with regard to mathematics (except in as far as the methods of investigation and proof are concerned, and which would form a branch of a well conceived course of logic), I cannot see why men intended for law, or for public life, should study them: or why any men should study them, who have not a particular vocation to them, or to some science or art in which they are extensively applicable. To all other men, the advantages derivable from them, as a gymnastic to the mind, might be derived (at least in a great measure) from a well conceived course of logic: into which, indeed, so much of mathematics as would suffice to give those advantages, would naturally enter.

Logic is a necessary preparation to the study of the moral sciences, where the ambiguity of the terms (especially that which consists in their varying extension), the number of collective names (apt to be confounded with existences), and the elliptical form in which the reasoning is expressed, render a previous

familiarity with the nature of terms and the process of reasoning absolutely necessary. In pure mathematics, and in the sciences to which these are largely applied, a previous acquaintance with the nature of induction, generalisation and reasoning may not be so necessary; because the terms are definite, the premisses few and formally introduced, and the consequences deduced at length. But to those who have not time to discipline their minds by this most perfect exemplification of these processes, a previous acquaintance with logic is absolutely necessary. Indeed, considering the sort of difficulties which beset moral disquisitions, logic is a better preparation than the mathematics or the physical sciences; which are not the theory of these mental processes, but merely exemplifications of them.

With regard to lawyers in particular, it may be remarked, that the study of the *rationale* of law is as well (or nearly as well) fitted as that of mathematics, to exercise the mind to the mere process of deduction from given hypotheses. This was the opinion of Leibnitz: no mean judge of the relative values of the two sciences in this respect. Speaking of the Roman Lawyers he says, 'Digestorum opus (vel potius auctorum, unde excerpta sunt, labores) admiror: nec quidquam vidi, sive rationum acumen, sive laudem nervos spectes, quod magis accedat ad mathematicorum laudem. Mira est vis consequentiarum, certatque ponderi subtilitas.'⁶⁵

And with regard to an accurate and ready perception of analogies, and the process of inference founded on analogy ('argumentatio per analogiam,' or 'analogica')—the basis of all just inferences with regard to mere matter of fact and existence,—the study of law (if rationally pursued) is, I should think, better than that of mathematics, or of any of the physical sciences in which mathematics are extensively applicable. For example, the process of analogical inference in the application of law: the process of analogical consequence from existing law, by which much of law is built out: analogical inferences with reference to the consideration of expediency on which it is built: the principles of judicial evidence, with the judgments formed upon evidence in the course of practice: all these shew that no study can so form the mind to reason justly and readily from

⁶⁵ Leibnitz, *Epist. ad Kestnerum*. And again, in the same epistle: 'Dixi sæpius, post scripta geometrarum, nihil extare, quod vi ac subtilitate cum Romanorum jurisconsultorum scriptis comparari possit, tantum nervi inest, tantum profunditatis. . . . Nec uspiam juris naturalis præclare exculti uberiora vestigia deprehendas. Et ubi ab eo recessum est, sive ob formularum ductus, sive ex majorum traditis, sive ob leges novas, ipsæ consequentiæ ex nova hypothesi æternis rectæ rationis dictaminibus adita, mirabili ingenio, nec minore firmitate diducuntur. Nec tam sæpe à ratione abitur quam vulgo videtur.'

analogy as that of law. And, accordingly, it is matter of common remark, that lawyers are the best judges of evidence with regard to matter of fact or existence.

And even admitting that, as a gymnastic, mathematics may be somewhat superior to law, still it is better that lawyers, and young men destined for public life, should not affect to know them extensively; but (having acquired the classics, and gone through a course of logic) should, as early as possible, bend their attention, strenuously and almost exclusively, to General Jurisprudence, Legislation, and all the sciences related to these, which tend more directly to fit them for their profession, or for practical politics.

By the former, they are merely exercising (with reference to their callings) the mental powers. By the latter, they are at once exercising the mental powers, and making the very acquisitions without which they are not adequately fitted to exercise their callings. If I want to go to York on foot, I may acquire the swiftness and endurance which would help me to my goal, by preparatory walks on the road to Exeter. But by setting out at the commencement for York, I am at once acquiring swiftness and endurance, and making a progress (during the acquisition) to the point which I am specially aiming to reach.

These remarks will not apply to men who are gifted with such velocity and such reach of apprehension, that they may aim safely at universality. They merely apply to men whose acquisitions are got by laborious attention: the only way in which, to my apprehension, they are to be got. These must content themselves with moderate acquisitions, out of the domain of the sciences bearing directly on their callings (enough to prevent bigotry), and must begin early to master those sciences. I am sorry it is so. For nothing would give me greater pleasure than extensive knowledge; especially of the strict sciences. But (speaking generally) he who would know anything well, must resolve to be ignorant of many things.

Necessity
for a Law
Faculty.

And here I must add that, in order to enable young men preparing for the profession, to lay a solid basis for the acquisition (in the office of a practitioner) of practical skill, and for subsequent successful practice, an institution like the Law Faculty in the best of the foreign universities seems to be requisite: an institution in which the general principles of jurisprudence and legislation (the two including ethics generally), international law, the history of the English law (with outlines of the Roman, Canon, and Feudal, as its three principal

sources), and the actual English law (as divided into fit compartments), might be taught by competent instructors.

In such a school, young men, not intending to practise, but destined for public life ('ad res gerendas nati'), might find instruction in the sciences which are requisite to legislators. Young men intended for administration (other than that of justice) would attend the law faculty; as, on the other hand, the men intended for law would attend the courses on the various political sciences, such as political economy, etc. For, however great may be the utility of the study of General Jurisprudence to lawyers generally; however absolute its necessity to lawyers entrusted with the business of Codification, its importance to men who are destined to take part in the public business of the country is scarcely inferior.

It is extremely important that a large portion of the aristocracy, whose station and talents destine them to the patrician profession of practical politics, should at least be imbued with the *generalia* of law, and with sound views of legislation; should, so far as possible, descend into the detail, and even pass some years in practice.

If the houses of parliament abounded with laymen thus accomplished, the demand for legal reform would be more discriminating, and also more imperative; much bad and crude legislation would be avoided;—opposition to plausible projects not coming from a suspected quarter. This, in the innovating age before us, is no small matter. And though lawyers, fully acquainted with system, alone are good legislators, they need perhaps a check on professional prejudices, and even on sinister interests.

But such a check (and such an encouragement to good lawyers) would be found in a public of laymen versed in principles of law, and not in men ignorant of detail and practice.

It appears to me that London possesses peculiar advantages for such a Law Faculty. The instructors, even if not practising lawyers, would teach under the eye and control of practitioners: and hence would avoid many of the errors into which the German teachers of law, excellent as they are, naturally fall, in consequence of their not coming sufficiently into collision with practical men. The realities with which such men have to deal, are the best correctives of any tendency to antiquarian trifling or wild philosophy to which men of science might be prone. In England, theory would be moulded to practice.

Besides the direct advantages of such an institution, many incidental ones would arise.

In the first place; a juridical literature worthy of the English bar.

Good legal treatises (and especially the most important of any, a good institutional treatise, philosophical, historical, and dogmatical, on the whole of the English law) can only be provided by men, or by combinations of men, thoroughly grounded and extensively and accurately read. Such books might be produced by a body of men conversant (from the duties of their office) with the subjects, but can hardly be expected from the men who now usually make them: viz. not lawyers of extensive knowledge (whose practical avocations leave them no leisure for the purpose, although generally they are the only men fit for the task), but young men, seeking notice, and who often want the knowledge they affect to impart.

Such men as I assume a law faculty to consist of, being accustomed to exposition, would also produce well-constructed and well-written books, as well as books containing the requisite information. Excellent books are produced by German Professors, in spite of their secluded habits; many of them being the guides of practitioners, or in great esteem with them (*e.g.* those of Professor Thibaut). In England, better might be expected, for the reason already assigned: viz. the constant view to practice forced upon writers by constant collision with practical men.

Secondly; Another effect of the establishment of a Law Faculty would be, the advancement of law and legislation as sciences, by a body of men specially devoted to teaching them as sciences; and able to offer useful suggestions for the improvement (in the way of systematising or legislating) of actual law. For though enlightened practical lawyers are the best legislators, they are not perhaps so good originators (from want of leisure for abstraction) as such a body as I have imagined. And the exertions of such men, either for the advancement of Jurisprudence and Legislation as sciences, or in the way of suggesting reforms in the existing law, might be expected to partake of the good sense and sobriety to which the presence and castigation of practitioners would naturally form them.

How far such an institution were practicable, I have not the means of determining.

There would be one difficulty (at first); that of getting a sufficient number of teachers competent to prove the utility of learning the sciences taught by them: masters of their respec-

tive sciences (so far as long and assiduous study could make them so); and, moreover, masters in the difficult art of perspicuous, discreet, and interesting exposition: an art very different from that of oratory, either in Parliament or at the Bar. Perhaps there is not in England a single man approaching the ideal of a good teacher of any of these sciences. But this difficulty would be obviated, in a few years, by the demand for such teachers; as it has been in countries in which similar institutions have been founded by the governments.

Another difficulty is, the general indifference, in this country, about such institutions, and the general incredulity as to their utility. But this indifference and incredulity are happily giving way (however slowly); and I am convinced that the importance of such institutions, with reference to the influence and honour of the legal profession, and to the good of the country (so much depending on the character of that profession) will, before many years are over, be generally felt and acknowledged.⁶⁶

Encouraging symptoms have already appeared; and there is reason to hope from these beginnings, however feeble, that the government of the country, or that the Inns of Court, will ultimately provide for law students, and for young men destined to public life, the requisite means of an education fitting them for their high and important vocations.

Having tried to state or suggest the subjects of the science of General Jurisprudence, with the manner in which those subjects ought to be expounded and exemplified; and having tried to demonstrate the uses which the study of the science might produce; I would briefly remark, that those uses are such as might result from the study, if the science were acquired by students of law (professional or intended for public life) with the requisite fulness and precision. But from mere attendance on a Course of Lectures (however completely and correctly conceived, and however clearly expressed), the science could not be acquired with that requisite fulness and precision. It could not be so acquired, though the lecturer brought to the task the extensive and exact knowledge, the powers of adequate and orderly conception, and the rare talent of clear exposition and apt illustration, which the successful performance of the task requires. For he could only explain adequately, or with an approach to adequacy, some certain parts in the whole series; filling up the gaps with mere indications of the necessary, but necessarily omitted, links.

⁶⁶ Written in the year 1834.

CODIFICATION AND LAW REFORM.

Prob-
ability of
some
attempts
at Codifi-
cation.

OWING to the growing bulk and intricacy of the English Law (a bulk and intricacy which must go on increasing) it is most probable, nay it is almost certain, that, before many years shall have elapsed, attempts will be made to systematise it, to simplify its structure, to reduce its bulk, and so to render it more accessible. Partially, such attempts have already been made, and are actually in project. And owing to the rapidity with which the accumulation of law goes on, to the incompatibility of many of its provisions with the changed circumstances of society, and to the turn for legal reform which public opinion is taking, it is most probable, nay it is almost certain, that the necessity for such changes will in a few years be felt or imagined, and that such changes will be attempted, skilfully or unskilfully. Of the expediency or in expediency of such changes I presume not to give an opinion. I merely affirm that changes of the sort are in progress, and that greater changes of the same sort are to be hoped or feared.

Now, whether such changes shall increase or diminish the evil, will depend upon the quality and the degree of the skill which shall be brought to the task. It will depend upon the number of competent workmen who can be brought to it. I shall therefore attempt to shew what are the attainments requisite for such an undertaking.

Re-con-
struction
must be
accom-
plished, if
at all, by
scientific
Lawyers.

First : with reference to the technical process of reconstructing the law, so as to reduce its bulk and to simplify its mechanism, it is clear that none but lawyers can be competent to it ; that none but lawyers intimately acquainted with the system to be operated upon, can ever produce it with effect.

But a mere acquaintance with the actual detail of the system, however extensive and accurate, will not suffice. It is necessary that those who are called to the task should possess that mastery of the system considered as an organic whole, which is the distinguishing characteristic of the consummate lawyer. It is pre-eminently necessary that they should possess clear and precise and ever-present conceptions of the fundamental

principles and distinctions, and of the import of the leading expressions; That they should have constantly before their mind a map of the law as a whole; enabling it to subordinate the less general under the more general; to perceive the relations of the parts to one another; and thus to travel from general to particular and particular to general, and from a part to its relations to other parts, with readiness and ease: to subsume the particular under the general, and to analyse and translate the general into the particulars that it contains.

Nor can it be said that this talent is a mere idea. It has been possessed by the consummate lawyers of every age and nation. It was possessed by the Roman lawyers, and is indeed their pre-eminent merit. Each seems to be possessed of the whole of the science; each seems to be capable of applying its principles with equal justness and certainty. Insomuch that the Roman law, as formed by them, and as contained in the excerpts from the writings of which the Pandects constitute a part, though formed by the several labours of several men through a long series of ages, has all the coherence which commonly belongs to the work of one master mind.

It was possessed by Coke and Hale, between the former of whom and the Roman lawyers the resemblance is striking. Though a chaos in form, the coherence of his mastery of the rules is complete.

Without the talent which I have endeavoured to describe, every attempt to systematise the law must, in my opinion, be abortive, or, at least, will fall short of the intended mark. All depends upon firm intention; upon an accurate conception of the leading principles and distinctions, of the subordination of the detail under those leading principles, and of the relations of those leading principles to one another. If these be accurately conceived, the faults in detail are easily corrected. If these be conceived confusedly, the faults are incurable.⁶⁷

It is moreover requisite that a considerable number of men qualified as I have described should exist. For a Code cannot be the work of any one single mind. And if the work of several it would be incoherent, though wrought out on a consistent plan, if not wrought out by men, each master of the system as an organic whole, and capable of working it out in detail consecutively. With such men, codification would doubtless be not

⁶⁷ 'Proderit autem hujus, quod nunc videant, plurima sui juris loca sine hujus molior, consideratio ad demendum apud ductu inextricabilem labyrinthum fore.' —Leibnitz, *Epist. ad Kestnerum*.

only possible but expedient; as is admitted by Von Savigny and by others of its bitterest opponents. And that the existence of such a number is not impossible, is shewn by the Pandects.

The only men to originate and accomplish, or to guide and accomplish, legislative innovations, are enlightened practical lawyers; combining all that philosophy can yield, with all the indispensable supplements of philosophy which nothing but practice can impart. And this appears to be the meaning of Lord Bacon, though he mentions 'viri civiles.'⁶⁸ With the practical conclusion which he deduces from the truth, I cannot agree. He seems to think that 'viri civiles' (meaning apparently public men, or practical politicians) are the only fit legislators. No men less fit. And it is evident that the talents and acquirements which he supposes in such men (and for which he supposes them eminently called to the 'heroical work' of legislation) are such as can only be found in enlightened practical lawyers: men who combine with an intimate knowledge of the existing system of law, a power and a liberal readiness to appreciate its merits and defects.

With regard to partial systematisation, it is still more necessary that it should be done by men thus qualified.

All attempts at Codification must be wrought out on one preconceived plan.

Unless projectors are insane, every process of Codification is wrought out on a preconceived and previously stated plan of the whole system to be wrought upon. Though, therefore, the workers are not qualified previously in the manner I have described, the authors of the plan itself have, by the preparation of it, disciplined themselves to the task in some degree. And those who execute the plan in detail have something of a guide in the plan itself. But in the case of bit-by-bit codification, the workmen have no plan before them of the whole law. And unless, by previous discipline, they have mastered the law to be operated upon as an organic whole, they are working on a part inextricably connected with the rest of the whole, without any perception of its relations to that unexplored, or at least undetermined, residue.

It seems to me that codification carried on in this manner

⁶⁸ 'Qui de legibus scripserunt, omnes vel tanquam philosophi, vel tanquam jurisconsulti, argumentum illud tractaverunt. Atque philosophi proponunt multa, dictu pulchra, sed ab usu remota. Jurisconsulti autem, suæ quisque patriæ legum, vel etiam Romanorum, aut Pontificarum, placitis obnoxii et addicti, judicio sincero non utuntur, sed tanquam e vinculis sermocinantur. Certe cognitio ista ad viros civiles proprie spectat; qui optime norunt, quid ferat societas humana, quid salus populi, quid æquitas naturalis, quid gentium mores, quid rerum publicarum formæ diversæ: ideoque possint de legibus, ex principiis et præceptis, tam æquitates naturalis, quam politices, discernere.'—Bacon, *De Augmentis Scientiarum*, Preface to the *De Fontibus Juris*, lib. viii. chap. iii.

(and which, I know not why, has gotten to itself the honourable name of practical), is far more rash than any conceivable scheme of all-comprehensive codification; and is much more likely to engender the confusion which, it is commonly supposed, all-comprehensive codification must produce.

But the talents and knowledge requisite for such a task cannot be acquired by a merely empirical study of our own particular system, and by the mere habit of applying its rules to particular cases in the course of practice. It can only be acquired by scientific study; and the study which I am trying to commend is of all others the best, with a view to the acquirement of it.

The study of General Jurisprudence (as shewn above) has a tendency to form men qualified with the very talent which is most requisite for systematisation (or simplification), which is the great condition '*sine qua non*' of codification; and the want of which (as is admitted by the ablest of the opponents of codification) is the great difficulty in the way of it. It tends to fix in the mind a map of the law, so that all its acquisitions made empirically in the course of practice, take their appropriate places in a well-conceived system; instead of forming a chaotic aggregate of several unconnected and merely arbitrary rules. It tends to produce the faculty of perceiving at a glance the dependencies of the parts of his system, which, as I have said, is the peculiar and striking characteristic of the great and consummate lawyer.

Undoubtedly, a sufficiently accurate knowledge of detail can only be acquired by practice founded on previous study. But there is a wide difference between the practical tact which suffices for the mere application of rules to practice, or for the discovery of rules applicable to the given case, and the adequate and clear perception of the legal system as a whole, and of the relations of its parts, which is necessary to the legislator; to him who is concerned, not with the mere application of rules, but with the reconstruction of such rules, their expression and arrangement, and with the numerous consequences with which any proposed innovation may be pregnant.

The very bulk of the system is an additional reason for a thoroughly systematic knowledge of it. Not only is an intimate acquaintance necessary with its rules as taken severally, but a perception of their relations to one another,—a map ever present to the mental eye, in which the dependencies of the parts, the apt place for every particular, and the consequence of the

alteration of any on any of the rest, may be traced with certainty.

Mere theorists are apt to stick in barren generalities, or to take no correct measure of what is practicable under existing circumstances. Mere practitioners (however able as such) are not capable of subordinating details to generalities and of perceiving the extent of such generalities; and, moreover, are incapable (from want of any standard of comparison) of appreciating the defects of their own system, and unwilling to amend them.

Theory and Practice are generally supposed to be incompatible. Though this is a gross error, there are doubtless some men to whom theory is more particularly useful; while there are others who, in the present state of opinion, would do well to avoid it. It may be feared that those who are not accustomed to abstract, may form hasty and ill-founded theories; and that those who have learned the principles of law in a general or abstract form, may only be perplexed by them when they come to the details of a positive system. Theory is a systematical statement of rules or propositions. Practice,—the application of any of these rules or propositions. Theory of what *is*, and theory of what *ought to be*, are perpetually confounded. Hence it is customary to oppose practice to *all* theory; because, in many cases, theories of what *ought to be* are erroneous; are not founded upon accurate observation; upon the accurate observations which the practitioner has the opportunity of making. Tidd's work is as much a theory of *what is*, as anything that ever bore the name.

Legislation must be accomplished by Scientific Lawyers.

Secondly, in respect of Legislation.

Innovations on the substance of existing law, can only be accomplished by lawyers,—whoever may conceive and suggest them. For every innovation on substance imports an innovation on form, though changes in the form are not, of necessity, changes in the substance. In respect, therefore, of changes in substance, in so far as they import corresponding changes in form and mechanism, all that I have said about total or partial codification or simplification in the way of extirpation and substitution, is fully applicable.

With a view even to changes in substance, they ought to originate with lawyers intimately acquainted with the system to be wrought upon. Or, though others may suggest them, they ought to be submitted to the judgment of such lawyers

before they are executed. None but they can determine how far such changes (though consonant to sound general principles of legislation) would accord with the actual circumstances in which the country is placed. Not to mention, that the end of many innovations is, in truth, often accomplished by existing law, or might be accomplished by some slight modification of it.⁶⁹

But in order that even lawyers may be fitted for guiding legislation, it is necessary that they should be lawyers who not only possess the indispensable requisite of familiar acquaintance with the actual system, and with the actual position of the country, but who also are acquainted with the science of legislation; therefore, with general jurisprudence (including comparative jurisprudence) as an integral portion of legislation; and with all those sciences (such as political economy) from which the science of legislation, considered as the science of law as it should be, is in great measure derived.

Without these studies, they cannot and will not appreciate impartially and justly, the merits and demerits of the existing law, the wants of the country, the expediency or in expediency of proposed innovations. Without them, they will evince the '*morosa morum retentio*.' They will not evince the candid readiness to admit the faults of the existing system, and to lend their aid to amend them, which is necessary to make them looked up to by the public as the guides of legislation: a position which, with this readiness (so indispensable to their guidance in all successful legislation), they infallibly would attain: a position most honourable to the profession, and lending a dignity to all its members: a position which, with a view to the public good, it is necessary they should attain. It is not in the power of the profession to prevent a change, but it is in their power to take the lead and to determine the course of the evitable movement: to discredit and crush (with the weight of influence founded on reason and public spirit) crude and mischievous innovations; to suggest useful innovations, and to carry useful innovations suggested by others into successful execution.

Sound legislative reforms (or sound innovations on the substance of the existing law) are not to be expected from the undisciplined sagacity of mere laymen: men who are neither acquainted, on the one hand, with the detail of the existing system, nor, on the other, with the general principles of law, with the science of legislation and with the sciences related to it: though suggestions from such men may be valuable. Nor

⁶⁹ Utility, in this respect, of the Court of Cassation.

can they be expected either from men who have acquired by mere solitary study such general principles, or from lawyers, however extensively acquainted with their own system, who have not qualified themselves in the manner described.

As is well remarked by Lord Bacon with regard to these two last-mentioned classes of men, in the passage just referred to in the 'De Augmentis,' mere speculators on law, however good their general principles, have no adequate knowledge of the actual system, or of the circumstances modifying the application of such principles, and which must be duly appreciated before they can be applied in practice; whilst merely practical lawyers, though never so accurately acquainted with the actual system, and with modifying circumstances, are so fettered by prejudices in favour of existing institutions, that they will not and cannot perceive and admit the expediency and necessity for the changes, which inevitable changes in the conditions of society are forcing upon them.

Thus, it appears clearly from the history of the English Law that the Equity of the Chancellors sprang, chiefly, from the illiberal adherence of the Common Law Courts to the defects of the law which they administered and of the procedure by which they enforced it. If they had successively adjusted their law and procedure to the successive demands for innovation which time incessantly engendered, the extraordinary jurisdiction of the Chancellors would have had no plausible ground; and the necessary and eternal distinction between strict Law and Equity would probably have been unknown to the law of the English nation, as well as to most of the systems obtaining in other communities.

Some enterprising judges in modern times have endeavoured, with more or less of success, to get to their own tribunals matters which Chancery had engrossed: [*E.g.* Lord Mansfield, and even that stickler for things ancient, Lord Kenyon.⁷⁰] But whether it were expedient to alter in this patchwork manner, now that the arbitrary line has been drawn, may be questioned.

I conclude by summing up the considerations on which the question of Codification turns.

Such are the evils of judicial legislation, that it would seem that the expediency of a Code (or of a complete or exclusive body of statute law) will hardly admit of a doubt. Nor would

*Résumé of
the ques-
tion of
codifica-
tion.*

⁷⁰ Read v. Brookman, 3 Term Reports, 151.

it, provided that the chaos of judiciary law, and of the statute law stuck patchwise on the judiciary, could be superseded by a *good* Code. For when we contrast the chaos with a positive code, we must not contrast it with the very best of possible or conceivable codes, but with the code, which, under the given circumstances of the given community, would probably be the result of an attempt to codify.

Whoever has considered the difficulty of making a good statute, will not think lightly of the difficulty of making a code. To conceive distinctly the general purpose of a statute, to conceive distinctly the subordinate provisions through which its general purpose must be accomplished; and to express that general purpose and those subordinate provisions in perfectly adequate and not ambiguous language, is a business of extreme delicacy and of extreme difficulty, though it is frequently tossed by legislators to inferior and incompetent workmen. I will venture to affirm, that what is commonly called the *technical* part of legislation, is incomparably more difficult than what may be styled the *ethical*. In other words, it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the lawgiver.

Accordingly, statutes made with great deliberation, and by learned and judicious lawyers, have been expressed so obscurely, or have been constructed so unaptly, that decisions interpreting the sense of their provisions, or supplying and correcting their provisions *ex ratione legis*, have been of necessity heaped upon them by the Courts of Justice. Such, for example, is the case with the Statute of Frauds; which was made by three of the wisest lawyers in the reign of Charles the Second: Sir M. Hale (if I remember aright) being one of them.

It follows from what I have premised, and will appear clearly from what I shall say hereafter, that the question of Codification is a question of time and place. Speaking in abstract (or without reference to the circumstances of a given community) there can be no doubt that a complete Code is better than a body of judiciary law: or is better than a body of law partly consisting of judiciary law, and partly of statute law stuck patchwise on a body of judiciary.

But taking the question in concrete (or with a view to the expediency of codification in this or that community) a doubt may arise. For here we must contrast the existing law (not with the *beau idéal* of possible codes, but) with that particular code which an attempt to codify would then and there engender.

And that particular and practical question (as Herr von Savigny has rightly judged) will turn mainly on the answer that must be given to another: namely, Are there men, then and there, competent to the difficult task of successful codification? of producing a code, which, on the whole, would more than compensate the evil that must necessarily attend the change?

The vast difficulty of successful codification, no rational advocate of codification will deny or doubt. Its impossibility none of its rational opponents will venture to affirm.

IDEA OF A COMPLETE LEGAL EDUCATION.

* (A) Philosophy of the Human Mind :
including its History.

(B) Logic :
including its History.

Ethics
(in the largest sense) :

(C) Politics :

(D) Political Economy :

Ethics
(in a narrower sense) :

Jurisprudence,

(E) Ethics
(*sensu stricto*).

Philosophical or General Jurisprudence :
International Law.

Positive or Particular
Jurisprudence.

(F) Historical and Dogmatical Outlines of Roman, Canon,
and Feudal law : with continued reference to General
Jurisprudence. Occasional Lectures on French, Prus-
sian, or other Systems.

English Law.

(G) Historical and Dogmatical Outlines of
English Law ; with reference to Gene-
ral Jurisprudence, including English Con-
stitutional Law and English Ecclesiastical
Law.

In Detail :

(H) Common Law.

Equity :
Practice of Conveyancing.

* I have not been able to discover to what these letters refer. —S. A.

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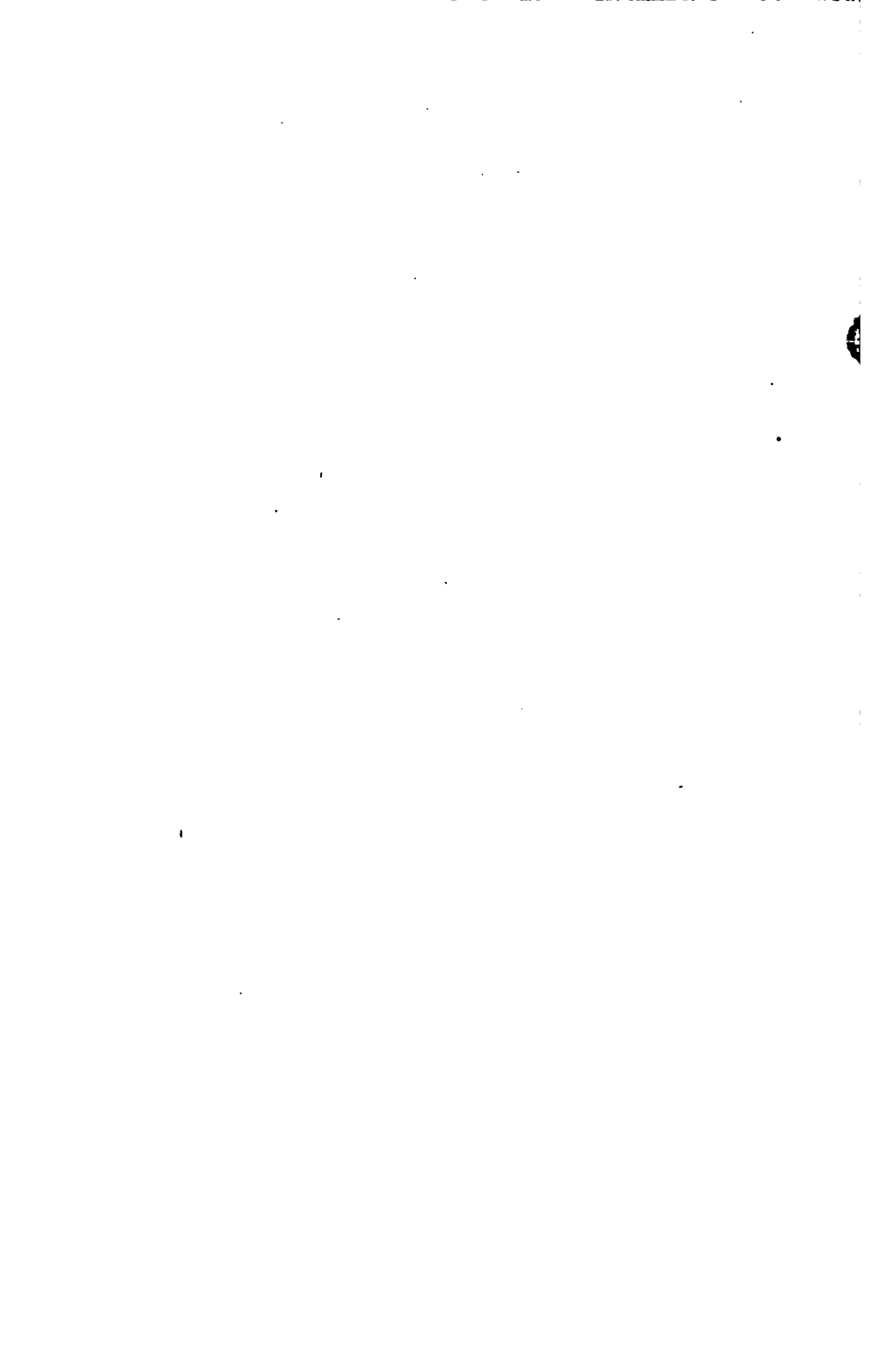
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